

# CITY OF DANA POINT



## COMMUNITY SERVICES AND PARKS DEPARTMENT

Michelle Mata  
San Diego Regional Water Quality Control Board  
9174 Sky Park Court, Ste. 100  
San Diego CA 92123  
[mmata@waterboards.ca.gov](mailto:mmata@waterboards.ca.gov)

**RE: Reg Measure ID 375971: MMATA, Place:656901**

Dear Ms. Mata:

The City of Dana Point appreciates the opportunity to comment on the Proposed General Waste Discharge Requirements for the Public Display of Fireworks – Tentative Order No. R9-2011-0022, NPDES No. CAG999002 and for the San Diego Regional Water Quality Control Board's efforts in coordinating the public workshops on this issue. We believe the public workshops proved to be productive in the development of this regulation.

We would like to comment and/or request clarification on a couple of items:

1. What is the purpose of the Public Fireworks Display Log? It is redundant with the Post Fireworks Display Report with the exception of the specific certification of FBMPP implementation. The certification of FBMPP could easily be added to the Post Fireworks Display Report Form which is required a mere five (5) days later.

In the spirit of efficiency, limited resources, streamlining paperwork and reporting, and the fact that the documents provide the same information (or can be easily modified to do so), please delete the requirement for the Public Fireworks Display Log and revise the Report Form to include the FBMPP certification.

2. Although the Instructions for Completing the NOI on page B-6 note that for a municipality a "duly authorized representative" can execute the Certification, which we feel is most appropriate, the Standard Provision on Page D-6, B.(c.) do not clearly provide that option. Please clarify that a "duly authorized representative" can execute the Certification statements.

We appreciate your consideration of these suggestions. Please do not hesitate to contact Lisa Zawaski at 949-248-3584 or [lzawaski@danapoint.org](mailto:lzawaski@danapoint.org) if you have a question regarding our comments.

Respectfully,

Kevin Evans  
Director of Community Services & Parks  
City of Dana Point

cc: B. Fowler, L. Zawaski

*Harboring the Good Life*



## Public Works Department

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April 11, 2011  
File # 0780-85-KY181

California Regional Water Quality Control Board  
San Diego Region  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123-4353

**Attention:** Michelle Mata  
**Reg Measure ID 375971 : MMATA**  
**Place: 656901**

**SUBJECT: COMMENTS ON THE NATIONAL POLLUTANT DISCHARGE  
ELIMINATION SYSTEM (NPDES) TENTATIVE ORDER NO. R9-2011-  
0022 GENERAL PERMIT FOR RESIDUAL FIREWORK POLLUTANT  
WASTE DISCHARGE TO WATERS OF THE UNITED STATES IN THE  
SAN DIEGO REGION FROM THE PUBLIC DISPLAY OF FIREWORKS  
(DRAFT DATED 03/21/2011)**

The City of Chula Vista appreciates the opportunity to provide comments on the Tentative Order No. R9-2011-0022, NPDES General Permit No. CAG999002. City staff has reviewed the Tentative Order and Attachments, and our comments are presented in Attachment A to this letter.

We trust that the Regional Board will give full consideration to our comments and recommendations in order to improve the Tentative Order, as well as to improve water quality in the San Diego Region.

Should you have any questions or if you need further information, please call me at (619) 397-6111. Thank you.



KHOSRO AMINPOUR  
SENIOR CIVIL ENGINEER

Attachment

c: Rick Hopkins, Director of Public Works  
Matt Little, Assistant Director of Public Works  
Silvester Evetovich, Principal Civil Engineer

**ATTACHMENT A – Comments on Tentative Order No. R9-2011-0022, Dated 03/21/2011**

1. General Comment – Permit fees and required monitoring will significantly increase total firework costs.

Recommendation – Consider Fourth of July firework events located within MS4 permitted areas as mobile commercial activities regulated under the MS4 permit. The operator will be responsible for the implementation of Best Management Practices (BMPs) in accordance with local ordinances, and the local jurisdiction will be required to regulate such activities. The money saved from permit fees and monitoring will be spent on more effective BMPs, which will result in better pollution prevention.

2. Section II.C, General Permit Application – This section requires application submittals even before the permit becomes effective on June 1, 2011. Still several questions remain regarding many aspects of permit compliance, and it is a concern that this accelerated schedule may compromise the quality of the Fireworks BMP Plan.

Recommendation – In order to provide reasonable time for developing Fireworks BMP Plans, our recommendation is to start permit coverage requirement at least 75 days after the permit effective date of June 1, 2011.

3. Section II.D, Notice of Enrollment – This section stipulates that the Notice of Enrollment may include specific conditions not stated in the Order, such as receiving water and sediment monitoring. To plan and implement such specific conditions require time before the date of the fireworks event.

Recommendation – It is recommended that the Notice of Enrollment be provided to the discharger at a reasonable time (for example 30 days) before the fireworks event date, to allow the discharger to plan and implement specific conditions included in the Notice of Enrollment. This minimum time period should be specified in the Order.

4. Attachment A, Definitions – In the definitions of Category 1 Discharger and Category 2 Discharger, it is not clear if the 1,000-pound threshold applies to the explosive weight per calendar year, per event, or per location. Assuming that a discharger submits an NOI for two locations and two events per year, what is the explosive weight limit per location and per event in order to remain in Category 1?

Recommendation – Please revise the definition within the Order and Attachments to clarify if the threshold weight of 1000 pounds is per calendar year, per event, or per location.

5. Attachment D, Section I.G, Bypass – The definition of Bypass in the context of fireworks is not clear.

Recommendation – Please provide further explanation of Bypass with a possible example.

6. Attachment D, Section IV.A, Standard Provisions – Records – This section appears to be related to sewage treatment plants.

Recommendation – Please revise or provide clarification.

7. Attachment D, Section V.E.2 – This section requires the reporting of any unanticipated bypasses that exceed any effluent limitations in the Order, while Section V.A of the Order shows that effluent limitations are not applicable.

Recommendation – Please clarify or revise the text.

8. Attachment E, Question No. 2, Are BMPs Adequate? – This question cannot be answered by water and sediment sampling and testing since background legacy pollution from other sources at each event location are unknown.

Recommendation – Please clarify or revise the question.

9. Attachment E, Section II, Monitoring Locations – This section requires Category 1 Dischargers under the Order to establish receiving water and sediment monitoring locations for discharges to Mission Bay and San Diego Bay. It is not clear how many monitoring locations are needed and if they are intended to be on a per event basis, or if they are supposed to look at San Diego and Mission Bays as a whole.

Recommendation – Please clarify the number of locations needed for sediment and receiving water monitoring and if monitoring is intended to be on a per event basis.

10. Attachment E, Section IX.A.3.b.ii.1, Sediment Sampling Frequency – This section requires that sediment sampling occur once every three years, but does not state when monitoring should begin.

Recommendation – Please clarify if sediment sampling is to be conducted in the first year of permit coverage or can be deferred to the second or third years. In addition, the timing of sediment sampling in relation to each fireworks event has not been specified.



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**April 20, 2011**

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9174 Sky Park Court, Suite 100  
San Diego, CA 92123

**Via Electronic Mail**  
[mmata@waterboards.ca.gov](mailto:mmata@waterboards.ca.gov)

**Re: Tentative Order No.R9-2011-0022, NPDES Permit No. CAG999002**  
*General Waste Discharge Requirements For Discharges Associated With Public Displays of Fireworks To Surface Waters In The San Diego Region*

Dear Ms. Mata and Regional Board members:

Please accept these comments on behalf of the Coastal Environmental Rights Foundation (CERF) in opposition to Tentative Order No. R9-2011-0022 (Fireworks Permit) by the Regional Water Quality Control Board (Regional Board). CERF is a nonprofit environmental organization founded by surfers in North San Diego County and active throughout California's coastal communities. CERF was established to aggressively advocate, including through litigation, for the protection and enhancement of coastal natural resources and the quality of life for coastal residents.

Unfortunately, as written, the Fireworks Permit is unsupportable. The revisions to the Permit since its first release have largely undermined the goals of the Clean Water Act and California Water Code, in some instances in direct violation of these laws. While, CERF appreciates the tremendous pressure the Regional Board faces as the first agency to regulate these discharges, a permit that is not truly protective of water quality, nor focused on closing information gaps, falls short of its purpose.

Admittedly, the information available to date has largely come from Sea World, and has been of limited usefulness in drafting a general permit for so varied firework events discharging into numerous water bodies. Though this reality has been candidly expressed by the Regional Board, it has not been reflected in the Fireworks Permit itself. In highlighting the shortcomings of the current draft, CERF hopes to provide suggestions that will enable the Regional Board to modify and adopt a scientifically sound Fireworks Permit which meets the two goals of gathering information currently lacking and ensuring water quality protection in the interim.

**I. The Permit Categorical Thresholds Are Arbitrary**

The current Fireworks Permit divides dischargers into two categories. Category 1 dischargers are distinguished from Category 2 dischargers by (1) receiving water body and (2) a threshold net explosive weight of 1000 lbs. However, the Board's reasoning for the "net explosive weight" distinction is not explained in any level of detail. Indeed, it is undermined by staff's analysis of the available monitoring data.

Furthermore, the diving logs for sample collection under Order No. R9-2005-0091 provided additional documentation of fireworks debris on the benthos of the discharge zone. **It is likely that firework duds, the incomplete combustion of fireworks, and post-fragmentation debris (wires, cardboard, etc...) contributes equal, if not greater, loads of pollutants to the benthos of receiving waters**

**than particulate fallout.** However, the proportion of pollutants from particulate fallout in relation to duds, debris or incomplete combustion has not been tested or quantified. (Permit, Fact Sheet, p. F-18, emphasis added).

The net explosive weight, as defined in Appendix A, includes the “weight of all pyrotechnic compositions, explosives material, and fuse only.” (Permit, Definitions, p. A-5). Excluded from this definition, and thereby made irrelevant to the categorical threshold issue, is paper and paste. Such an approach cannot be reconciled with the above-quoted language, which clearly indicates duds, and post and incomplete combustion debris, including paper and paste, likely contribute equal *if not greater* pollutant loads to receiving waters.

As highlighted in the Fireworks Permit, diving logs at Sea World clearly evidence the deposition of duds and other firework debris in the fallout area, eventually on the bay floor. (Permit, Fact Sheet, p. F-18). Sea World has reported an average of 11 lbs nightly and 8 lbs the next morning are picked up along the surface of the water and at Fiesta Island. (*Id.*). However, this debris is unaccounted for in the Regional Board’s threshold, which only considers “net explosive weight”.<sup>1</sup> In light of the Board’s “discharge description”, which clearly reflects all firework components reach surface waters, such an approach is unsupportable.

The chemical constituents within the fireworks are scattered by the burst charge, which separates them from the fireworks casing and internal shell components. A firework **combustion residue** is produced in the form of smoke, airborne particulates, chemical pollutants, and **debris including paper, cardboard, wires and fuses.** This combustion residue can fall into surface waters. In addition, **un-ignited pyrotechnic material** including duds and misfires can also fall into surface waters. (Permit, pp. 10-11).

Although it is unclear how dischargers would estimate their “net explosive weight”, available figures show it is not a simple calculation. A cursory review of 2010 fireworks events in the City of San Diego has shown the following *shell numbers* for events:

Event	Waterbody	Total # of Shells
Big Bay Boom	San Diego Bay	18,040
Paradise Point	Mission Bay (Paradise Point)	986
La Jolla Cove	Pacific Ocean (La Jolla Cove)	804
Sea World	Mission Bay (Fiesta Island)	520
Mira Mesa Community 4th of July	n/a	463
Ocean Beach Main Street	Pacific Ocean (OB Pier)	416
Rancho Bernardo Spirit of the 4th	n/a/	382
Lake Murray	Lake Murray	364
La Jolla Country Club	n/a	328
Mission Bay Yacht Club	Mission Bay (Sail Bay)	143

<sup>1</sup> One FBMP requires dischargers to remove and manage particulate matter and debris from the firing range and affected surface waters, but this is only to be done to the “extent practical” and can be delayed a full 24 hours after the public display – at which point much of the pollutants will have settled or been carried away by prevailing winds and currents. (Permit, p. 19).

The event with by far the largest number of fireworks shells is the Big Bay Boom<sup>2</sup>. The second largest is Paradise Point, adjacent to the Sea World show, and within the same 303(d) listed waterbody, Mission Bay. The third largest show is La Jolla Cove, adjacent to the La Jolla ASBS. As currently written, the Fireworks Permit does not account for shell number.<sup>3</sup> Indeed, as explained below, the La Jolla Cove fireworks show adjacent to the ASBS enjoys an exemption in the current draft of the permit without any mention of the number of shells used.

Sea World's January 2007 Report, prepared by Dr. Conkling, estimated firework weights and composition based on firework vendor representations and Department of Transportation applications. (An Analysis of the Fireworks Used at Sea World/San Diego, John A. Conkling, January 2007 ("Conkling Report")). These number have not been independently verified, and the analysis below is merely illustrative of the oversimplification used in determining categorical thresholds.

Based on these figures, it appears the relationship between chemical composition and number of shells is not linear. This is actually evident in the Regional Board's own analysis, as 6 minute shows, consisting of up to 250 shells are estimated to weigh 216 pounds of the total 284 pounds. (Fireworks Permit, Fact Sheet p. F-36; Conkling Report, Appendix C). Major shows (such as 4<sup>th</sup> of July shows) last 20 minutes, consist of up to 1750 shells, and reportedly weigh 961 pounds of the total 1313 pounds. (*Id.*; Conkling Report, Appendix D). Dr. Conkling's report states 4<sup>th</sup> of July shows comprise of 1,418 shells (not 1,750). However, even assuming the 1,750 figure is accurate, it is clear the relationship between number of shells and net explosive weight is not linear. For the 6 minute shows, net explosive weight is 75 percent of the total weight, and each shell is assumed to weigh .864 lbs. For 20 minute shows, net explosive weight is only 73 percent of the total weight. Using the 1750 figure, shells are assumed to weight .55 lbs each, and .68 lbs using the 1418 shell figure.

Also evident in Dr. Conkling's analysis is the fact that total shell number is not as important as shell size. As shell size goes up, the chemical constituents, as a percentage of the total firework composition, goes up (ie. explosive weight increases). Mr. Conkling's figures have been used to create the table below.

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<sup>2</sup> Sea World data shows 1,418 shells are used during 4<sup>th</sup> of July events. Its application to the City of San Diego states only 520 shells are used. It may be the case that the figures for 4<sup>th</sup> of July in Dr. Conkling's study are now out of date and inaccurate. CERF suggests the Regional Board obtain clarification as to this discrepancy. Another discrepancy exists regarding the total weight of 4<sup>th</sup> of July fireworks (previously cited in the Permit as 2185lbs). This figure is also cited in Sea World monitoring reports.

<sup>3</sup> Event organizers, including those of the Big Bay Boom, always speak of bigger and better shows. In all likelihood, these numbers will only increase in future years.

### Firework Composition by Shell Size

		Weight (g)	% Weight
3 INCH	Break/lift	65	25
	stars	100	38
	paper/paste	96	37
	Total	261	
4 INCH	Break/lift	120	25
	stars	255	54
	paper/paste	96	20
	Total	471	
5 INCH	Break/lift	265	29
	stars	510	56
	paper/paste	141	15
	Total	916	
6 INCH	Break/lift	390	26
	stars	850	56
	paper/paste	279	18
	Total	1519	

Simply counting the number of shells used does not give an accurate “net explosive weight”. It is also evident that it does not capture the full extent of pollutants actually reaching the receiving waters, which would be more accurately captured by total weight for each show. More importantly this exercise still does not accurately characterize those discharges which are likely to adversely impact water quality. This is because the Regional Board does not have sufficient data – nor do firework event sponsors – to determine the threshold at which firework events are unlikely to cause impacts to water quality.

It appears staff relied upon the only data available (which as explained below is highly suspect) to set the threshold between Category 1 and 2 dischargers. Though staff acknowledge the limited usefulness of the monitoring data, the Fireworks Permit nonetheless sets an arbitrary threshold based entirely on this data. After looking at *six sampling events*, this conclusion is reached regarding the potential of certain categories of fireworks events to negatively impact water quality.

The water column monitoring documented an increased level of total metal concentrations in the SeaWorld fireworks fallback area relative to the reference site(s) for aluminum, cadmium, chromium, copper, lead, nickel, selenium, thallium, vanadium and zinc. The dominance of pollutants in the particulate form after major events provides evidence that single fireworks event greater than 1000 pounds has the reasonable potential to contribute pollutants to sediment in an enclosed bay or estuary. While sampling in the SeaWorld fireworks fallback area **clearly**



documented an accumulation of metals within the fallback area sediment, the data on cumulative effects is too limited to discern differences in accumulation between and among events, nor determine rates of accumulation or attenuation (see Figure 3). (Permit, Fact Sheet, p. F-17 (emphasis added)).

Thus, based entirely on an increased percentage of impacted sediment samples after two major fireworks shows at Sea World (4<sup>th</sup> of July and Labor Day), the Regional Board has determined shows that are not major are not likely to impact water quality. However, this syllogism does not hold true.

What can be said is that after the two major events, more sediments were impacted and water quality likely impacted as well. What cannot be said is that absent major events the sediment is not impacted. Indeed, two other sampling events were conducted outside of the fireworks season, one of which showed a higher percentage of impacted sediments, another which showed a low percentage of impact. As for the remaining two sampling events, they were also conducted during fireworks season, and they both showed elevated impacts to sediment. However, one of these sampling events was not related to a major event. Thus, the only thing that can actually be gleaned from this data is that fireworks cause impacts.

Further, *even if* major fireworks shows were the *only ones* associated with water quality or sediment impacts, the threshold would properly be set to capture the major shows, **not above them.**<sup>4</sup> The estimated net weight associated with major shows is 961 lbs. Thus, at the threshold level of 1000 lbs, even these shows would not be captured in Category 1.

Therefore, the threshold – set entirely based on a net explosive weight associated with major events – is not supported by the Sea World data, or logic. Major fireworks shows cause impacts, and smaller ones cause impacts as well.

A more rational approach to distinguishing between fireworks shows would take into account a number of factors, including: the number and size of shells used in the event; proximity to other events in the same waterbody or upstream/downstream waterbodies; whether the receiving water is 303(d) listed; special protections and designations for the receiving water; and frequency of events.

CERF urges the Regional Board to return to the approach taken in the first draft of the Fireworks Permit, which did not distinguish between categories of dischargers. Rather, monitoring should be required in at least one location for each water body where fireworks are discharged, and all 303(d) listed waterbodies. In addition, all discharges into or near an ASBS should be prohibited.

## II. Sea World Monitoring Is of Limited Value

In the 2005 four-year monitoring report, SAIC chose three reference sites in Mission Bay Channel, Mariner's Basin, and Quivira Basin, "generally upwind" from the Sea World fireworks barge, and "therefore, expected to be unaffected by the fireworks displays." (SAIC, Impacts From SeaWorld San Diego Fireworks Displays to Mission Bay Sediment and Water Quality, Year 4 Monitoring Final Report). This did not, however, take into account the other fireworks shows also conducted within Mission Bay.

In reviewing fireworks permits issued by the City of San Diego, CERF became aware of two

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<sup>4</sup> Indeed, one would also expect a reasonable margin of safety.

4<sup>th</sup> of July fireworks shows conducted in Mission Bay, in addition to the Sea World show: Paradise Point and Mission Bay Yacht Club. As shown in the table provided in section I, *infra*, Paradise Point actually has the second largest show (in terms of the number of shells). Although it is unclear how long these events have been held, an internet search reveals the history of the events dates at least as far back as 2001.<sup>5</sup>

Unfortunately, either Sea World representatives did not feel this was relevant or were unaware of this in designating sampling locations for monitoring background areas and reference sites, which were largely directly within the deposition or fallout zone for these two shows. Depending on circulation within Mission Bay and prevailing winds, it is also possible firework residue and debris from these two locations impacted other parts of Mission Bay not within their respective anticipated fallback areas. (See Enclosed Figure)

Monitoring conducted later, under the 2005 Addendum to Sea World's NPDES Permit also failed to account for these other shows, taking background samples and reference samples directly within the fallout zone for the Paradise Point and Mission Bay Yacht Club fireworks. This may explain the general toxicity of all sediment samples taken with Mission Bay.

Based on SeaWorld's sediment toxicity and benthic community analysis, it was difficult to draw any conclusions regarding the benthic effects of fireworks displays to the differences found between the reference stations and the fireworks fallout area. Additional monitoring may be necessary to separate possible effects associated with fireworks displays and effects from other pollutant sources to Mission Bay, such as storm water discharges. The results for the short-term survival sediment toxicity sampling were highly variable spatially and temporally within the fireworks deposition zone and temporally within the reference sites. **Sampling in Sediment toxicity test results for both reference sites and the deposition zone fireworks fallout area ranged from non-toxic to highly toxic.** Thus, it was difficult to detect any difference in short term toxicity between and among the sites. All sites did appear to exhibit decreased survival rates when compared to laboratory control samples. (Permit, Fact Sheet, pp. F-13-14 (emphasis added)).

Though the Regional Board seems to have relied on Sea World monitoring for little more than establishing that larger shows (or the accumulation of many small shows) has the potential to cause impacts, the failure to consider other nearby firework shows within the same water body evidences the shortcomings of the current monitoring.

Therefore, CERF urges the Regional Board not to rely heavily on the monitoring results, either as an indication that certain firework shows are less problematic (ie. smaller daily shows) or to establish a threshold. Indeed, the only conclusion staff could reach from Sea World monitoring data is that an increase in the level of total metals concentration was observed in the water column, and that pollutants in particulate form were documented, after fireworks events. (Permit, Fact Sheet, p. 17 and Figure 3). Reliance on the Sea World monitoring data to actually set a specific threshold between Category 1 and 2 dischargers is therefore unwise. The highly suspect nature of the monitoring data, coupled with the arbitrary nature of the threshold, requires elimination of the threshold altogether and further underscores the need for more robust and accurate monitoring data.

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<sup>5</sup> <http://www.laprensa-sandiego.org/archieve/june29/firework.htm>

### III. The ASBS Temporary Event Exceptions Are in Violation of the Ocean Plan

The current version of the Fireworks Permit allows direct discharge into the Laguna Beach ASBS and discharge directly adjacent to the La Jolla ASBS. (Permit, p. 25). The fact sheet explains:

Public firework display events have been occurring over or adjacent to near the La Jolla ASBS since 1984. The annual Fourth of July event conducted at Scripps Park by the La Jolla Community Fireworks Foundation is located approximately one-quarter mile from the La Jolla ASBS. The fireworks fallout area may extend into portions of the ASBS. The event typically runs 20-25 minutes. The number and size of shells launched are unknown at this time. It is estimated that, in 2010, less than 500 pounds net weight of pyrotechnics material is discharged into the air over or adjacent to the La Jolla ASBS during this single event. (Permit, Fact Sheet, pp. F-42-43 (emphasis added)).

In previous iterations of the Fireworks Permit, the Regional Board wrote in the exception for the La Jolla and Laguna ASBS events, without supporting figures for the La Jolla Cove show.

Public firework display events have been occurring over or adjacent to the La Jolla ASBS since 19\_\_\_. The annual Fourth of July event conducted by the La Jolla Community Fireworks Foundation typically runs approximately \_\_\_\_\_ minutes and during that time approximately \_\_\_\_\_ aerial shells are ignited and launched. The aerial shells range in size from \_\_\_\_\_ to \_\_\_\_\_ inches. It is estimated that \_\_\_\_\_ pounds of pyrotechnic material is discharged into the air over or adjacent to the La Jolla ASBS during this single event. (Draft Fireworks Permit Strikeout/Underline, version 2/8/2011, Fact Sheet, pp. 40-41 (highlight added)).

Clearly, the Board made a decision to allow the discharge without supporting rationale. Though the Fireworks Permit now contains some (but not all) of the missing figures, the result was seemingly predetermined: the fireworks discharges qualify for the “limited-term activity” exception.

Still unknown, according to the Permit, is the number and size of shells. This data is actually readily available – in fact it was provided to the Regional Board by CERF representatives at the workshop on March 11<sup>th</sup>: 804 shells for 2009 and 2010 shows, consisting of 10-3inch, 100-2.5inch, 200-3inch, 218-4inch, 176-5inch shells, and 100 salutes.<sup>6</sup> La Jolla Community Fireworks Foundation, on the other hand, after providing the information now found in the current permit fact sheet, flippantly responded to Regional Board inquiry stating “[t]he rest of the requested information [the number and size of shells] calls for such a level of detail...that it cannot be confirmed at this juncture and is not necessary to the findings in the Tentative Order.” (Latham & Watkins Comment Letter, March 7, 2011, p. 4).

The Regional Board nonetheless carved out an exception to this strict ASBS discharge prohibition in the Ocean Plan: “Waste **shall not be discharged** to areas designated as being of

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<sup>6</sup> La Jolla Community Fireworks Foundation and previous sponsors routinely provide this information to the City of San Diego in their applications for Single Event Permits from the City’s Fire-Rescue Department. Using Dr. Conkling’s figures, the La Jolla Cove event fireworks weigh 411lbs in “net explosive weight” and 819 lbs total. Though this is below the arbitrary 1000 lb threshold, no other discharger would simply be allowed to discharge 411-819 lbs of pollutants directly adjacent to or above the ASBS.

special biological significance. Discharges shall be located a sufficient distance from such designated areas to assure maintenance of natural water quality conditions in these areas.” (Ocean Plan, p. 20 (emphasis added)).

The Regional Board allows for these discharges by inappropriately invoking a limited term activity exception to the prohibition.

Regional Boards may approve waste discharge requirements or recommend certification for limited-term (i.e. weeks or months) activities in ASBS. Limited-term activities include, but are not limited to, **activities such as maintenance/repair of existing boat facilities, restoration of sea walls, repair of existing storm water pipes, and replacement/repair of existing bridges**. Limited-term activities may result in temporary and short-term changes in existing water quality. Water quality degradation shall be limited to the shortest possible time. The activities must not permanently degrade water quality or result in water quality lower than that necessary to protect existing uses, and all practical means of minimizing such degradation shall be implemented. (Ocean Plan, pp. 20-21(emphasis added)).

CERF representatives have previously commented on the limited purpose of this exception; it is for repair or maintenance type activities. This exception has, in the past, been used to allow repair for bridges or storm drains, but is not meant to be a general catch-all exception for discharges that simply are of short duration. State Board representatives have confirmed, this exception is only to be applied to true maintenance and repair activities.<sup>7</sup> Surely no other discharger attempting to “temporarily” discharge 819 lbs of pollutant adjacent to the ASBS would be given such leeway.

Not only does the Regional Board’s new (unsupported) reading of the Ocean Plan exception set a terrible precedent, it allows a continued, long-term discharge into ASBS under the auspices of a limited term activity. The fireworks shows are annual, by their very nature they repeatedly occur. The La Jolla Cove fireworks show has been ongoing for 26 years. (Permit, Fact Sheet, p. F-42). As a matter of public policy, it is truly illogical to create a carve-out for pollution simply because it is tradition.

Underscoring the truly arbitrary nature of the ASBS exceptions, one of the Fireworks Best Management Practices (FBMP) is to locate firework discharges “a sufficient distance from areas designated ASBS to assure maintenance of natural water quality conditions in these areas”. (Permit, p. 19). Another FBMP requires the discharger to design the firing range, or consider alternative firing ranges, to eliminate or reduce residual firework pollutant waste discharges to waters of the US. (*Id.*). There is no attempt to ascertain the feasibility of application of the FBMPs to the ASBS shows. It is difficult to reconcile these FBMP, the Ocean Plan’s clear directive that “all practical means of minimizing such degradation shall be implemented”, and the Regional Board’s silence on the issue of location of the fireworks. (Ocean Plan, p. 21).

Clearly, firework events can be held at a variety of locations, whether over water or land. To simply allow an inherently mobile discharger to locate discharges either directly over or adjacent to an ASBS, without any mention of alternative locations, surely does not meet the mandatory Ocean Plan dictate to implement “all practical means of minimizing such degradation”. (*Id.*).

The State Water Resources Control Board is currently undertaking a long, comprehensive

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<sup>7</sup> Personal communication with Dominic Gregorio.

review of requested exceptions to the Ocean Plan for permanent exemptions to the ASBS discharge prohibition. The State Board's six-year-long process has culminated with the pending California Environmental Quality Act (CEQA) review. The EIR for the State Board's exemption process details the statewide attempt at defining "natural water quality" for ASBS. (ASBS Program Draft Environmental Report, January 18, 2011, pp. 43-44). The State Board's Natural Water Quality Committee (NWQC) had a three-year mission to define natural water quality at the La Jolla ASBS. (*Id.*). The Committee's September 2010 final report<sup>8</sup> defined natural water quality as:

That water quality (based on selected physical chemical and biological characteristics) that is required to sustain marine ecosystems, and which is without apparent human influence, i.e., an absence of significant amounts of:

- a) man-made constituents (e.g., DDT);
- b) other chemical (e.g., trace metals), physical (temperature/thermal pollution, sediment burial) and biological (e.g., bacteria) constituents at levels that have been elevated due to man's activities above those resulting from the naturally occurring processes that affect the area in question; and
- c) non-indigenous biota (e.g., invasive algal bloom species) that have been introduced either deliberately or accidentally by man.

(*Id.*; see NWQC Summation of Findings). Thus, in order to protect or prevent degradation of natural water quality, we should strive to reduce the introduction of man-made constituents and other chemicals into the ASBS. There is no indication the Regional Board has even considered the ramifications of the fireworks shows on natural water quality by introducing a plethora of man-made constituents and chemicals into the ASBS.

Also highlighted in the NWQC Summation of Findings is Scripps Institute of Oceanography biological monitoring results (NWQC Summation of Findings, pp. 6-7). Two of the four stated results indicate that: (1) certain pollutants were elevated in transplanted mussels near SIO Pier (Chromium, Nickel, Iron, and Manganese) and at the south end of the adjoining La Jolla ASBS relative to other sites within the study area; and (2) certain pollutants were elevated in transplanted mussels near the SIO pier (Chromium and Nickel) relative to historical statewide Mussel Watch results. Manganese is used as a catalyst in fireworks.<sup>9</sup> Iron is used to produce sparks<sup>10</sup> and chromium is also used in fireworks.<sup>11</sup> (Permit, p. 5). Nickel is used in fireworks as nichromium as well.<sup>12</sup> All four of these metals were found in solid waste samples, in water and in sediment samples, collected after Sea World fireworks shows, as reported in Sea World's 2006 Report of Waste Discharge. (Sea World 2006 RWD, pp. 3-8-9, 3-11).

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<sup>8</sup>

[http://www.waterboards.ca.gov/water\\_issues/programs/ocean/docs/asbs/asbspeir\\_apx08\\_2011jan.pdf](http://www.waterboards.ca.gov/water_issues/programs/ocean/docs/asbs/asbspeir_apx08_2011jan.pdf)

<sup>9</sup>

[http://portal.acs.org/portal/acs/corg/content?\\_nfpb=true&\\_pageLabel=PP\\_ARTICLEMAIN&node\\_id=841&content\\_id=WPCP\\_010292&use\\_sec=true&sec\\_url\\_var=region1&\\_\\_uuid=1e6435fc-c42f-4c9d-8576-84019102b849](http://portal.acs.org/portal/acs/corg/content?_nfpb=true&_pageLabel=PP_ARTICLEMAIN&node_id=841&content_id=WPCP_010292&use_sec=true&sec_url_var=region1&__uuid=1e6435fc-c42f-4c9d-8576-84019102b849)

<sup>10</sup> <http://chemistry.about.com/od/fireworkspyrotechnics/a/fireworkelement.htm>

<sup>11</sup> [http://toxtown.nlm.nih.gov/text\\_version/chemicals.php?id=10](http://toxtown.nlm.nih.gov/text_version/chemicals.php?id=10)

<sup>12</sup> Nickel and Chromium were found in elevated levels in the fallback area in Sea World 2008-2010 monitoring. (Permit, Fact Sheet, p. F-12, 17); <http://www.buzzle.com/articles/nickel-the-element.html>

**Coastal Environmental Rights Foundation**  
**Tentative Order No. R9-2011-0022**  
**April 20, 2011**  
**Page 10 of 10**

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Interestingly, the Fireworks Permit now calls for natural water quality to be defined, as outlined in the NWQC final report, by monitoring reference sites. However, the ASBS is likely the best indicator of natural water quality itself. Not surprisingly, the NWQC report acknowledges that today's natural water quality is unlikely the same as it was 35 years ago when the Ocean Plan was adopted. In other words, "[t]ruly natural water quality probably does not now exist in California's coastal ocean, and may be rare throughout the world." (NWQC Summation of Findings, preface). The NWQC ultimately found it "should be possible to define a reference area or areas for each ASBS that currently approximate natural water quality and that are expected to exhibit the likely natural variability that would be found in that ASBS." (*Id.*). This bleak outlook is also reflected in the NWQC's recommendation that regulatory agencies now consider how to deal with a shifting baseline as human activities will continue to impact ASBS and potential reference sites. (*Id.* at 19).

Thus, the beneficial use of the ASBS of "preservation and enhancement of designated" ASBS is already an impaired use. (Ocean Plan, p. 3). Our inability to define truly natural water quality, and the reality that water quality at ASBS and reference sites will only deteriorate with population growth, is a truly compelling reason to strictly enforce the Ocean Plan discharge prohibition. It is at the very least a reason to prohibit unnecessary pollutant discharge directly adjacent to or within an ASBS. The Ocean Plan's narrow exception for limited-term maintenance and repair activities for facilities essential to public service should not and cannot be abused to allow for fireworks displays where they should clearly be prohibited.

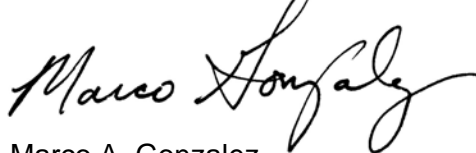
#### **IV. Conclusion**

CERF representatives have been active participants in the Regional Board's firework permitting process, particularly through this general Fireworks Permit, and since its inception when Sea World's NPDES permit was first amended to account for fireworks discharges. This Regional Board has more experience with permitting of fireworks discharges than arguably any other agency nationwide. CERF applauds the Regional Board for paving the way for future agencies, and its efforts to regulate these widespread and frequent discharges. However, we cannot support a permit that is not scientifically defensible and protective of water quality and beneficial uses, and which fails to incorporate monitoring requirements that will inform the Regional Board in future decisions and iterations of this permit. We strongly urge the Board to: (i) eliminate the threshold for category 1 and 2 dischargers; (ii) prohibit discharges into and adjacent to the ASBS; and (iii) require at least one representative monitoring location within every receiving water to which firework pollutants are discharged.

Thank you for your consideration of these comments, and for addressing this important water quality issue.

Sincerely,

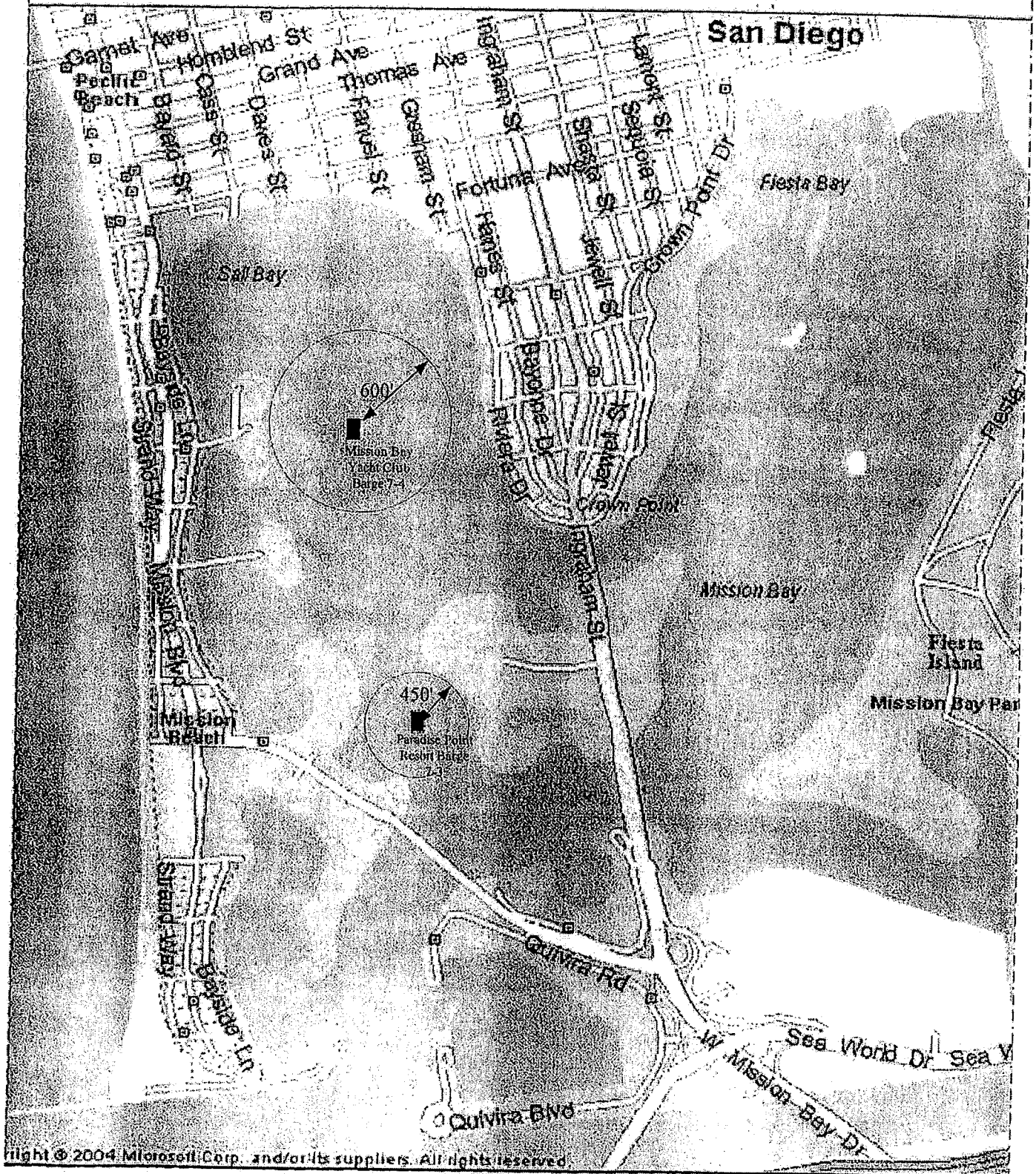
**COAST LAW GROUP LLP**



Marco A. Gonzalez  
Legal Director

:

# Paradise Point Resort 7/3/05 & Mission Bay Yacht Club 7/4/05 Barge Locations





John J. Lormon

Direct Dial: (619) 515-3217

E-mail: john.lormon@procopio.com

April 20, 2011

**VIA E-MAIL**

Mr. David T. Barker  
California Regional Water Quality Control Board  
San Diego Region  
9174 Sky Park Court  
San Diego, CA 92123

**Re: March 21, 2011 Tentative Order No. R9-2011-0022; NPDES Permit No. CAG999002; General National Pollutant Discharge Elimination System (NPDES) Permit For Residual Firework Pollutant Waste Discharges To Waters Of The United States In The San Diego Region From The Public Display Of Fireworks**

Dear David:

The above referenced Tentative General Permit ("Order") covers residual firework pollutant waste to inland surface waters, enclosed bays and estuaries, harbors, lagoons, and the Pacific Ocean. The Order is scheduled for public hearing on May 11, 2011 by the California Regional Water Quality Control Board ("Regional Board") and shall become effective of June 1, 2011 and expire on May 31, 2016. The comments provided below are provided on behalf of my client, the San Diego Armed Services YMCA, for consideration by the staff and the Board prior to and at the hearing.<sup>1</sup>

**I. GENERAL COMMENTS**

It should be recognized that the Regional Board's effort to regulate fireworks displays is novel and appears to be driven by a desire to protect the dischargers from the threat of a citizen suit as much as it is by the need to control the discharges. Because the Regional Board must make findings to justify the issuance of the Order, and because these findings must be supported by substantial evidence in the record, the Board will rely on the factual assertions and support

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<sup>1</sup> The San Diego Armed Services YMCA is the not-for-profit charitable beneficiary of the Big Bay Boom Fourth of July fireworks display on San Diego Bay.



Mr. David T. Barker  
April 20, 2011  
Page 2

provided by the staff reports and the record made at the public hearing. In its current state the evidence will not support issuance of the Order.

For example, the existing SeaWorld fireworks monitoring data tells us that at best it would take more than 100 years for a comparable once-a-year fireworks event to create water quality and sediment effects such as exist at SeaWorld.<sup>2</sup> Unlike the stagnant and shallow Mission Bay water, San Diego Bay is deeper and more dynamic and even for a 1,000 pound display, the extensive monitoring required (directly or collaboratively) for such a show cannot be justified. For the Board to impose such monitoring the burden, including costs, of this obligation must bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. While the Board may seek information from the discharger, it is constrained to do so only as may be reasonably required.<sup>3</sup> Applying these principles to this case, there is no support to justify water quality and sediment quality monitoring of once a year firework demonstrations in San Diego Bay.

## **II. DISCHARGE CATEGORY**

The Order applies to any person discharging fireworks over surface waters. However, for certain firework events it potentially includes additional and expensive requirements, (principally water quality and sediment quality monitoring and reporting). Whether these more strenuous and costly obligations apply depends on the geographical location of the discharge (San Diego Bay and Mission Bay). For these locations, the net weight of the fireworks discharged (1,000 pounds per year) and whether the display is considered to be a single event determine the imposition of the added burden. Yet, if a display discharges fireworks debris into surface waters other than those listed, no matter how many pounds of fireworks that are involved, the permit obligations are less strenuous. This result seems arbitrary and not consistent with water quality programs and policy.

## **III. SINGLE EVENT**

This Order should treat each barge displaying fireworks as a separate event especially if these barges are located at a distance where water quality impacts create separate impacts, where the show is one time a year, and where each barge or the net explosive weight of fireworks on each barge is less than 1,000 pounds. The San Diego Bay barges are approximately one mile to ten miles apart, the discharge overlap edge effects, if any, are miniscule.

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<sup>2</sup> It is reasonable to assume that the SeaWorld shows with less than 1,000 pound fireworks contribute to the cumulative impact identified in the Mission Bay monitoring of their major holiday fireworks events.

<sup>3</sup> California Water Code sections 13267 and 13383.

Mr. David T. Barker  
April 20, 2011  
Page 3

**IV. NOI/NOE**

Once a discharger files its notice of intent (“NOI”), the Regional Board has the opportunity through the notice of enrollment (“NOE”) to include specific conditions not stated in the Order. We request that the Order include a notice and an opportunity to comment before special conditions are added to this Order.

**V. CHEMICALS OF CONCERN**

It is not clear why a discharger who exceeds 1,000 pounds net explosive weight would be treated differently if they were discharging over inland versus bay waters. This is particularly true since perchlorate seems to be a chemical of significant concern in regard to fireworks waste discharges. Perchlorate is a human health risk and subject to regulation under public health and federal drinking water standards. Since neither San Diego Bay nor Mission Bay is used for drinking water purposes it is inconsistent and illogical to impose the monitoring obligations on those areas when no such obligation is imposed on fresh water reservoirs.

**VI. FALLOUT AREA**

The Order defines the Fallout Area as “the area in which fireworks debris and pollutants fall after a pyrotechnic device is detonated. The extent of the Fallout Area depends on wind and the angle of mortar placement.” The Order also contains a definition for Firing Range, “the Firing Range is that area over which fireworks may travel by design or accident and upon which fireworks pollutant waste may fall. It includes the fireworks launching area and adjacent shorelines, quays, docks and the fireworks Fallout Area.” These definitions are vague and do not provide reasonable certainty or provide legally sufficient guidance to create and bind a discharger to the legal obligations established in the Order. Furthermore, they do not establish fair notice for purposes of compliance or enforcement. For example, on the 4<sup>th</sup> of July it is not only a barge operator who would be discharging fireworks, as history has shown there are many private parties as well as smaller fireworks events that can occur on that day. Creating an obligation based on a debris discharge area that may not be associated with a discharger’s activity is placing a responsibility that is beyond the statutory reach of this Board. A person should only be liable for waste that they discharge and not for that of a third party. A more conservative approach to defining the Fallout Area and the Firing Range area that is both legally appropriate and fair is the definition used by the Coast Guard. The Coast Guard in its authorization for this event for the 4<sup>th</sup> of July Big Bay program employs a 300 meter radius, and it is more likely than not that it is within that radius that the bulk of fireworks discharge, if any, will occur.

Mr. David T. Barker  
April 20, 2011  
Page 4

## **VII. APPLICATION FEE**

The Regional Board has classified the fireworks activity as a Category 3 threat to water quality. That category is defined as “those discharges of waste that could degrade water quality without violating water quality objectives, or could cause a minor impairment of the designated beneficial uses.” It should be noted that the Regional Board does not know what amount, if any, of the net explosive material will actually result in discharge of the waste to the surface waters. The Regional Board itself recognizes the fireworks debris discharge is not likely to be a significant discharge.

As a result, the Regional Board established the minimal fee of \$1,200 plus a \$252 surcharge to be paid on an annual basis. If as the Order indicates there were 66 different events in San Diego Bay last year, and many of those are one time only events, the cost of filing 66 different NOIs becomes substantial. Thus, we ask that a single permittee such as the Port of San Diego be allowed to authorize all events within its jurisdiction. While the Board cannot order the Port to do that, we ask if this possibility would be acceptable to the Board.

## **VIII. THE FIREWORKS POST EVENT REPORT FORM**

This form requires a map or diagram that identifies the Firing Range and adjacent shoreline, quays and docks and other appropriate features of the Firing Range and adjacent affected surface waters. Again, the uncertainty surrounding the definitions of the Firing Range and Fallout Area create a vague, overbroad and unreasonable burden without fair notice to the discharger as to what should be or reasonably be included in the scope of the area to be addressed in this report. Thus, limiting that area to 300 yards would make sense. The fireworks post event report also asks the discharger to indicate which fireworks were environmentally friendly. Yet the Order’s Definition section does not define environmentally friendly fireworks.

## **IX. ADDENDA**

Finally, we note that the Order needs to add definitions for many terms which are now open to uncertainty and confusion. For example, what is the difference between discharger, sponsor, host and operator? Point source is not sufficiently interpreted nor applied to the unique nature of fireworks, which staff groups into three general categories. The definition for the term “net explosive weight” is not sufficient and leaves room for debate. The word “continuous” is not found in the definition section of the Order. There are other examples where clarity could be added to the Order by adding or modifying the Definition section.

Mr. David T. Barker  
April 20, 2011  
Page 5

Thank you for the opportunity to provide these initial comments, and I request the right to include additional comments at the hearing on this Order.

Sincerely,

John J. Lormon

JJL/bb

cc: Paul Steffens  
H. P. Purdon

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April 20, 2011

## VIA ELECTRONIC AND U.S. MAIL

Hon. San Diego Regional Board Members  
 David Gibson, Executive Director  
 c/o Michelle Mata  
 Water Resource Control Engineer  
 San Diego Regional Water Quality Control Board  
 9174 Sky Park Court  
 San Diego, California 92123-4340

**Re: Draft General NPDES Permit No. CAG999002 for the Public Displays of Fireworks**

Dear Mr. Gibson and Honorable Board Members:

Thank you for the opportunity to comment on the final draft Tentative Order No. R9-2011-0022, NPDES No. CAG999002 (“Tentative Order”). We submit these comments on behalf of the La Jolla Community Fireworks Foundation (“LJCFF”), a non-profit corporation organized for the purpose of promoting patriotism and community spirit by preserving La Jolla’s Fourth of July tradition of a public fireworks display located at Scripps Park.

As stated in our December 9, 2010 and March 7, 2011 letters, and as we outlined at the December 16, 2010 and March 11, 2011 workshops on this matter, we continue to maintain that the San Diego Regional Water Quality Control Board (“Regional Board”) does not have the legal authority to regulate the public display of fireworks. We do not believe that there is sufficient precedent rooted in federal case law or any provision in the Clean Water Act (“CWA”) that would categorize fireworks displays as a “point source” discharge. Therefore, as a jurisdictional matter, fireworks displays (whether coastal, near-coastal, or inland) cannot be regulated by the Regional Board under the NPDES program.

It is important to note that neither the EPA, the State Board, nor any other Regional Board in California has concluded that fireworks constitute a “point source” discharge. We find it unsettling that the San Diego Regional Board seeks to regulate what no other government authority has attempted to regulate since the inception of the NPDES permitting program in 1972. The rationalization that SeaWorld voluntarily agreed to submit to a NPDES permit in order to resolve a prior dispute (and EPA did not stand in the way of this voluntary permitting) side steps the core legal issue. We continue to question the Regional Board’s statutory authority to sweep within its regulatory jurisdiction once-per-year shows, especially where the Regional Board has not shown that the activity to be regulated is a “point source”

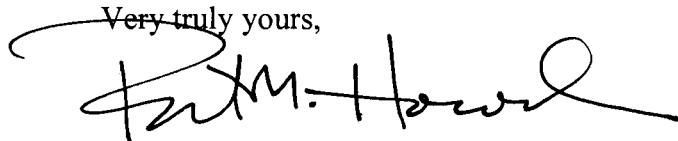
LATHAM & WATKINS LLP

under the CWA and, in fact, acknowledges in the Tentative Order that these activities “pose no significant threat to water quality.”<sup>1</sup>

Without waiving any rights to dispute the limits of the Regional Board’s regulatory authority, we believe that the draft Tentative Order makes thoughtful and sensible technical findings based upon the available science. We agree that the scientific evidence supports the conclusion that fireworks displays over water “pose no significant threat to water quality”<sup>2</sup> and the “proper implementation of the BMPs” included in the Tentative Order “will assure the protection of water and sediment quality within the receiving waters.”<sup>3</sup> LJCFF believes that the Special Provisions of the Tentative Order at Section VII.C.2 (pages 24-25) related to the Ocean Plan and allowable discharges to the La Jolla Area of Special Biological Significance (“ASBS”) are also reasonable approaches that are well supported by the science.

Although we continue to dispute the Regional Board’s categorization of fireworks as a CWA “point source” discharge, the Staff has no doubt been thoughtful and responsive to our comments, which we sincerely appreciate. We believe that the Staff has rigorously evaluated the technical issues (though not the legal issues) and worked hard to strike a better balance than the original draft Tentative Order. Thank you for your consideration of LJCFF’s comments.

Very truly yours,



Robert M. Howard  
of LATHAM & WATKINS LLP

Attachments

cc: Deborah Marengo  
Adam Harris

---

<sup>1</sup> Tentative Order at 8.

<sup>2</sup> Tentative Order at 8

<sup>3</sup> Tentative Order at 26

#### **D. Notice of Enrollment**

The San Diego Water Board will review the application package for completeness and applicability to this Order. Notice of Enrollment (NOE) under this Order will be provided to the Discharger by the San Diego Water Board upon receipt of a complete NOI, Fireworks Best Management Practices Plan, and application fee. The NOE may include specific conditions not stated in this Order, including but not limited to receiving water and sediment monitoring. Any such specific conditions and requirements shall be enforceable. The effective enrollment date will be specified in the NOE and the Discharger is authorized to discharge residual firework pollutant waste starting on the date specified in the NOE. General Permit coverage will be effective when all of the following have occurred:

1. The Discharger has submitted a complete permit application;
2. The Fireworks Best Management Practices Plan has been accepted by the San Diego Water Board; and
3. The San Diego Water Board has issued a Notice of Enrollment (NOE).

#### **E. Notice of Exclusion (NOEX)**

The San Diego Water Board may issue a Notice of Exclusion (NOEX), which either terminates the permit coverage or requires submittal of an application for an individual permit. An NOEX is a one-page notice that indicates that the proposed Discharger is not eligible for coverage under this General Permit and states the reason why. This justification can include, but is not limited to, necessity to comply with a total maximum daily load or to protect sensitive water bodies.

#### **F. Fees**

Under this General Permit, fireworks discharges require no treatment systems to meet the terms and conditions of this Order and pose no significant threat to water quality. As such, they are eligible for Category 3 in section 2200(b) (8) of Title 23, California Code of Regulations (CCR). This category is appropriate because regulation of firework discharge under this Order incorporates best management practices (BMPs) to control potential adverse effects to beneficial uses, and this General Permit prohibits residual firework pollutant waste from causing excursions of water quality objectives. The annual fee associated with this rating can be found in section 2200(b) (8) of Title 23, CCR, which is available at <http://www.waterboards.ca.gov/resources/fees/>.

- q. In addition to any other grounds specified herein, this Order or a Notice of Enrollment from the San Diego Water Board shall be modified or revoked at any time if, on the basis of any data, the San Diego Water Board determines that continued discharges may cause unreasonable degradation of the aquatic environment.
- r. The San Diego Water Board or the Director of the USEPA may require any person requesting enrollment under this Order or subject to waste discharge requirements under this Order to apply for and obtain an individual NPDES permit. Cases where an individual NPDES permit may be required include but are not limited to those described in 40 CFR 122.28 (b) (3).
- s. It shall not be a defense for the enrollee in an enforcement action that effluent limitation violations are a result of analytical variability rendering the results inaccurate. The validity of the testing results, whether or not the enrollee has monitored or sampled more frequently than required by this Order, shall not be a defense to an enforcement action.
- t. The Discharger shall take all reasonable steps to minimize or prevent any discharge in violation of this Order which has a reasonable likelihood of adversely affecting human health or the environment.
- u. For the purposes of this Order, the term permit, general permit, and WDR, shall have the same meaning as the term Order used elsewhere in this Order.

## **B. Monitoring and Reporting Program (MRP) Requirements**

The Discharger shall comply with the MRP and future revisions thereto in Attachment E of this Order.

## **C. Special Provisions**

### **1. Reopener Provisions**

Order No. R9-2011-0022 may be re-opened and modified, revoked, and reissued or terminated in accordance with the provisions of 40 CFR 122, 123, 124, and 125. The San Diego Water Board may reopen the permit to modify permit conditions and requirements. Causes for modifications include the promulgation of new regulations or adoption of new regulations by the State Water Board or San Diego Water Board, including revisions to the Basin Plan.

### **2. Special Provisions for Discharges into La Jolla and Heisler Park ASBS**

Discharges of residual fireworks pollutant waste by the La Jolla Community Fireworks Foundation into the Pacific Ocean offshore of Scripps



Park approximately one-quarter mile south from the La Jolla ASBS, and by the City of Laguna Beach into the Heisler Park ASBS may continue subject to the following conditions:

- a. The residual firework pollutant waste discharges shall be limited to those resulting from one Fourth of July celebration public fireworks display event per calendar year.
- b. The net explosive weight of fireworks used in the public fireworks display event shall not exceed 1,000 pounds of pyrotechnic material.
- c. The areal extent of the firing range in the ASBS shall be limited to the maximum extent practicable to prevent or reduce residual firework pollutant waste discharges in the ASBS.
- d. The residual firework pollutant waste discharges shall not permanently alter natural water quality conditions<sup>5</sup> in the ASBS receiving waters. Temporary excursions from natural ocean water quality conditions resulting from residual firework pollutant waste discharges within any portion of the firing range located in the ASBS are permissible if beneficial uses are protected.
- e. The residual firework pollutant waste discharges shall comply with all other applicable provisions, including water quality standards, of the Ocean Plan.

### **3. Special Provisions for SeaWorld San Diego Discharges**

- a. The October 15, 2009 Report of Waste Discharge submitted by Sea World Inc. is deemed complete for the purpose of enrollment under this Order. The enrollment date will be effective upon the effective date of this Order and SeaWorld San Diego is authorized to discharge residual firework pollutant waste starting on this date pursuant to the requirements of this Order. The requirements of this Order will supersede the requirements of SeaWorld San Diego's Order No. R9-2005-0091, NPDES No. CA0107336, for residual firework pollutant waste discharges upon the effective date of this Order.
- b. SeaWorld San Diego shall submit the filing fee for coverage under this Order, specified in Section II.F of this Order, no later than June 1, 2011.
- c. SeaWorld San Diego shall prepare and submit a Fireworks Best Management Practices Plan containing the information specified in

<sup>5</sup> Natural ocean water quality will be determined by the Southern California Water Research Project (SCCWRP) ASBS Monitoring Program which is designed to define natural water quality in ASBS areas at selected reference sites.

Section V.B. of this Order no later than September 1, 2011.

- 4. Special Studies, Technical Reports and Additional Monitoring Requirements – Not Applicable**
- 5. Construction, Operation and Maintenance Specifications- Not Applicable**
- 6. Special Provisions for Municipal Facilities (POTWs Only) – Not Applicable**
- 7. Other Special Provisions – Not Applicable**
- 8. Compliance Schedules – Not Applicable**

#### **VIII. COMPLIANCE DETERMINATION**

This Order requires the use of minimum stipulated BMPs to control and abate the discharge of pollutant wastes from public fireworks events to surface waters in the San Diego Region. Proper implementation of the BMPs will assure the protection of water and sediment quality within the receiving waters. Dischargers enrolled under this Order are expected to comply with all water and sediment quality objectives through the implementation of BMPs. Compliance will be determined by evaluating the proper implementation of the minimum stipulated BMPs and their effectiveness in preventing and minimizing pollutant waste loading from public fireworks events to surface waters. Compliance will also be evaluated using information obtained under the monitoring and reporting program of this Order. ]

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& NELSON PC**  
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**Brian L. Zagon**  
Attorney  
Phone: 925-299-5105  
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April 20, 2011

**VIA EMAIL AND FAX**

David Gibson  
Executive Officer  
California Regional Water Quality Control Board  
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San Diego, CA 92123  
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Fax: (858) 571-6972

**Re: Comments of Pyro Spectaculars, Inc. to Tentative Order No. R9-2011-0022, Proposed NPDES Permit No. CAG999002 for the Public Display of Fireworks  
Regional Board Meeting: May 11, 2011**

Dear Mr. Gibson:

We represent Pyro Spectaculars, Inc. ("PSI"). PSI is a family-owned fireworks display company that creates and sells fireworks shows to public, private and non-profit customers around the country, including in the San Diego Region. PSI has submitted comments in response to both prior tentative orders and participated in the two workshops conducted by the Regional Board staff. While we fundamentally disagree on the Regional Board's authority to require a discharge permit in these circumstances, we and PSI very much appreciate the Regional Board's willingness to listen to and exchange ideas with representatives of the fireworks display companies, show sponsors and members of the San Diego community regarding the tentative orders. Most importantly, we and PSI appreciate the efforts of the Regional Board staff to balance the interests of environmental protection with the interests of the citizens in the San Diego Region in celebrating their patriotism with a traditional public 4<sup>th</sup> of July fireworks celebration.

Representatives of PSI will attend the May 11, 2011 Regional Board meeting at which Tentative Order No. R9-2011-0022 (the "Tentative Order") will be considered for adoption. The purpose of this letter is to provide the Regional Board with PSI's remaining comments to the Tentative Order. PSI also requests an opportunity to address the Regional Board during the May 11, 2011 meeting.

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PSI is a fifth generation family company that has been performing public fireworks displays for more than three decades, including many displays in the San Diego area. The owners and employees of PSI have vast experience in the professional display of fireworks and perform hundreds of displays every year throughout California, the nation and the world.

PSI is committed to the highest possible levels of professional industry participation, and it regularly participates and assists in the development, maintenance and enforcement of state, national and international fireworks standards, laws and regulations. PSI employees provide many training sessions each year for its pyrotechnic operators. PSI works directly with the State Fire Marshal's office in the development and presentation of in-service training for hundreds of authorities with jurisdiction over fireworks displays and pyrotechnic special effects.

PSI's comments are generally divided into two main categories. First, PSI submits there is no legal or scientific basis for the Regional Board to require an NPDES permit for public fireworks shows. The Tentative Order will create a permit process for annual fireworks shows that does not exist anywhere else in California or the United States. Second, should the Tentative Order be adopted, based on its decades of experience selling and firing public fireworks display shows, PSI requests that certain time periods in the Tentative Order be modified. PSI does not think that modifying these time periods will negatively impact the permit process or the protections for the environment embodied in the Tentative Order.

## **I. GENERAL COMMENT 1**

### **A. THERE IS NO LEGAL BASIS FOR THE REGIONAL BOARD TO ADOPT THE TENTATIVE ORDER**

In prior comment letters, PSI has set forth its position that the Regional Board lacks the legal authority to regulate fireworks shows pursuant to the federal Clean Water Act or the California Water Code. The Tentative Order will create a permit process for annual fireworks shows that does not exist anywhere else in California or the United States.

The federal Clean Water Act's NPDES and the California WDR requirements are applicable only to "point sources" of pollution. City of Arcadia, et al. v. State Water Resources Control Board, 135 Cal.App.4<sup>th</sup> 1392, 1404-05 (2006). "Point source" is defined as "any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged." 33 U.S.C. § 1362; Cal. Water Code § 13373. Fireworks displays are not "discernible, confined and discrete conveyances" for the discharge of pollutants to navigable waters. Fireworks shows are seasonal entertainment events where pyrotechnics are launched into the air from a mortar. Fireworks, not "pollutants,"

are shot out of the mortars.

The legislative history of the Clean Water Act shows that Congress intended only to cover discharges that were at least “frequent,” or that resulted in some “measurable” waste entering the water. NW. Envtl. Def. Ctr. v. Brown, 617 F.3d 1176, 1183 (9th Cir. 2010). The definition of “point source” and the examples given by Congress “evoke images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways.” Plaza Health Labs., Inc., 3 F.3d 643, 646 (2d Cir. 1993) (emphasis added). Seasonal fireworks shows typically take place only once per year and are not an industrial source of “pollutants.” The evidence in the record before the Regional Board shows that occasional public fireworks shows are not “frequent” nor do they result in any “measurable” amount of material entering the water. Any small amount of debris that may fall to the water surface is incidental to the primary entertainment purpose of the show. Incidental discharges from airborne deposition have been considered “non-point discharges” under the Clean Water Act. For these reasons, there is no legal basis to regulate fireworks displays as proposed in the Tentative Order.

## **B. THERE IS NO SCIENTIFIC BASIS TO SUPPORT ISSUANCE OF THE TENTATIVE ORDER**

PSI also does not believe that there is a scientific basis for the Regional Board’s decision to regulate fireworks displays within the San Diego Region. Data from the sampling by SeaWorld in Mission Bay clearly demonstrates that no significant impact to water quality is associated with the vast number of fireworks shows (80 or more shows) put on by SeaWorld over Mission Bay each year. The data is compelling when one considers the unique features of Mission Bay that are unlike most other waterbodies in the San Diego Region.

According to the terms of the Tentative Order, both the Regional Board and the United States EPA have classified fireworks displays as very minor discharges. Further, the Tentative Order states that “the threat to water quality and complexity of the discharge is determined to be category 3C” (Tentative Order, p. 1, Table 1). Under Title 23, Section 2200 of the California Administrative Code, “category 3C” is the lowest possible threat discharge. Simply stated, there is no scientific basis here to support issuance of the Tentative Order.

## **II. GENERAL COMMENT 2**

By letter dated March 7, 2011, Gary Brown, General Counsel of PSI, submitted comments focused on the Fireworks Best Management Practices Plan (BMPs) set forth in Section V., paragraph B of the prior proposed tentative order. PSI’s comments focused on the practical aspects of implementing the BMPs in a manner that is

consistent with the applicable rules, regulations, law and safe handling practices for public fireworks displays, while at the same time maintaining the level of environmental protection the BMPs were intended to provide. Revisions to the BMPs to achieve this purpose were discussed at length at the March 11, 2011 Regional Board workshop. The revised BMPs in the Tentative Order are consistent with the applicable rules, regulations, law and safe handling practices for public fireworks shows, while at the same time maintain the level of environmental protection the BMPs were intended to provide.

If the Tentative Order is adopted, PSI believes that it appears to provide a workable solution for the San Diego Region subject to the two exceptions set forth below.

#### **A. THE TIME PERIOD TO SUBMIT AN APPLICATION FOR THE PERMIT**

In Section II.C., (page 7) of the Tentative Order, for the period after June 10, 2011, a show sponsor (identified as a "Discharger") must submit an application for coverage under the general permit to the Regional Board at least 60 days before the event. Based on its decades of experience selling public fireworks display shows, many shows, including some in the San Diego Region, do not get booked until two weeks before the event. More and more frequently, the non-profit and municipal sponsors of annual 4<sup>th</sup> of July fireworks shows do not know if they will have enough money to have the show until the proverbial "last minute." Accordingly, PSI requests that the Tentative Order be modified to require that a show sponsor apply for an application at least 20 days before the event.

At the workshop on March 11, Regional Board staff expressed interest in how much notice is required to obtain other permits necessary for a public fireworks show. Other permitting authorities generally have shorter time periods than 60 days for applying for permits associated with public fireworks shows. California Health and Safety Code § 12643 requires application to the State Fire Marshall or local fire department at least 10 days before a public fireworks show. Title 19 of the California Administrative Code, Section 993.1 requires only 72 hours notice to the State Fire Marshall before a fireworks show on State owned or occupied property. Most local fire departments require 14 days notice, with some requiring a longer period of up to 30 days. We understand that the City of San Diego requires 14 days to obtain a special event permit.

In Section I.E.3 of its Fact Sheet (attachment F-19), the Regional Board states that the U.S. Coast Guard has a 135 day notice requirement for its permit. It has been PSI's experience that if a show is booked less than 135 days before an event for which a Coast Guard permit is required, the Coast Guard has worked with PSI to issue the

permit in time for the event, especially for events in areas that are well-known to the Coast Guard.

PSI recognizes that the Regional Board needs sufficient time to review the applications submitted by show sponsors and to provide notice of enrollment. Most applications for annual 4<sup>th</sup> of July shows will be submitted this year between May 11 and June 20, 2011. Given the lower number of applications anticipated after June 20, 2011 and the fact they will not all be submitted within the same 30 day period, submission of applications after June 20, 2011 at least 20 days before the event (instead of 60 days) should be a workable time period. Accordingly, PSI requests that the Tentative Order be modified to require submission of the permit application at least 20 days before the event.

## **B. FIREWORKS POST EVENT REPORT**

The Tentative Order now requires that the Fireworks Post Event Report be completed within 10 days after the event and, for shows conducted on the 4<sup>th</sup> of July, the report be submitted to the Regional Board by August 1. (Attachment C-1 and Section X.B.3, Table 2, at Attachment E-10.) PSI appreciates that the Regional Board has lengthened these time periods from the prior tentative orders. However, these periods are still not long enough given the vast numbers of shows conducted over the 4<sup>th</sup> of July fireworks season which can run from late June through mid-July.

Much of the information required to complete the Fireworks Post Event Report will be supplied by the fireworks display company. These companies, including PSI, annually supply hundreds of shows for the 4<sup>th</sup> of July season. Following the shows, all of the equipment is returned from the location of the show to PSI. There is a lot to do, including cleaning, refueling and returning hundreds of rented trucks, managing mountains of equipment and paperwork, completing payments, invoicing, and other accounting.

The operators for each show complete a pyrotechnic operator post display report and submit it to the State Fire Marshall within 10 days, a copy of which is customarily sent to PSI. Information from the pyrotechnic operator post display report is needed to complete the Fireworks Post Event Report. PSI often does not receive its copy of the pyrotechnic operator post display report until after the 10 day period. Accordingly, PSI requests that the Tentative Order be modified to provide 30 days for completion of the Fireworks Post Event Report. In addition, PSI requests that the Fireworks Post Event Report for shows on July 4<sup>th</sup> be due to the Regional Board by August 15.

Thank you for the opportunity to provide comments on the Tentative Order. We and PSI look forward to presenting our comments and answering any questions the Regional Board may have at the May 11, 2011 hearing.

Respectfully submitted,  
**Hunsucker Goodstein & Nelson PC**



Brian L. Zagon

BLZ:mm  
cc: Gary Brown (via Email)





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*"The Difference is Quality"*

April 20, 2011

San Diego Regional Water Quality Control Board  
9174 Sky Park Court  
San Diego, CA 92123-4340

Ref: Reg Measure ID 375971: MMATA  
Place: 656901

Mr. Gibson and Members of the Water Quality Control Board:

Once again I express my amazement at the workings of the board. In one sentence I read fireworks "pose no significant threat to water quality", yet this board continues the action of Tentative Order No. R9-2011-0022.

I must say, throughout the process, the Water Quality Board has been most accommodating to fireworks sponsors. The water monitoring requirement was dropped in most instances and there is now a Category One and Category Two Discharger. However, two things remain constant throughout: a permit fee that is excessive along with the permit process and no basis at all for proceeding with any of this. The Board and their advocates state that fireworks pollute the water. I do not disagree, as technically, paper coming down from exploded shells and landing in the water is a form of pollution, but not a significant threat to the water quality. Along that same thought I contend that a surfer pollutes the water, but is not a significant threat to water quality. I contend that a boat pollutes the water, but is not a significant threat to water quality, in most instances. I contend that anything man does to invade the water in its natural state is a pollutant to the water, but again, in most instances, not a significant threat to water quality. However, if fireworks need a permit to pollute the water with chemicals that are natural, and let's remember that the chemical that goes into fireworks is not the chemical reaction that comes out of the fireworks, then so too should a surfer need a permit to take his suntan lotion and surfboard into the water.

Simply put, if there is no significant threat to water quality, there is no need for a permit. That would be just common sense, but also logic.

To date, the Water Quality Board has done nothing nor shown any proof to back the need of a permit. Yet, the board still wants to collect the fee from every sponsor, host, or whatever other name you come up with. This does not tell me the Water Board is as concerned about the water quality as they are about the permit fee.

This Water Board is attacking an industry, a form of entertainment that has been around for over 200 years in this country. If fireworks were a major polluter, the footprint would be there for everyone to see, there would be no guessing. This Water Board is proposing to do serious financial harm to companies, to individuals and to organizations, and for what? NO SIGNIFICANT RISK TO WATER QUALITY. The financial ramifications to this action are huge, millions of dollars, impacting jobs, and affecting the economy of San Diego and again, for no significant risk to water quality.

This water board should be taking action against significant threats to water quality and only when this board has the proof that it is a threat, not when it is an ounce of prevention.

Driving more potential revenue from San Diego and the State of California based on no significant risk is not an action that makes any sense at all. Protect the environment by all means, protect the water of course, but use some common sense. Millions of gallons of pollution spills into the ocean from the Tijuana River and we sit here and do nothing because we say we can't. But take up an action such as this because you are pushed by an activist who has no proof, is just plain wrong.

Once again, I say to you: Cancel this action now.

Respectfully,



Joseph R Bartolotta  
President

Cc: Governor Jerry Brown  
Senator Joel Anderson  
Senator Christine Kehoe  
Senator Duncan D Hunter  
Assemblyman Nathan Fletcher  
Assemblyman Brian Jones  
Assemblyman Marty Block

April 20, 2011

Via Hand Delivery and Email

Mr. David W. Gibson  
Executive Officer  
Ms. Michelle Mata  
Water Resource Control Engineer  
San Diego Regional Water Quality Control Board  
9174 Sky Park Court  
San Diego, CA 92123-4340

SUBJECT: Tentative Order No. R9-2011-0022, NPDES Permit for Public Display of  
Fireworks; Reg Measure ID 375971: MMATA Place:656901

Dear Mr. Gibson and Ms. Mata:

The San Diego Unified Port District ("Port") appreciates the opportunity to provide comments on Tentative Order No. R9-2011-0022, General National Pollutant Discharge Elimination System ("NPDES") Permit for Residual Firework Pollutant Waste Discharges to Waters of the United States in the San Diego Region from the Public Display of Fireworks ("Tentative Order"). These comments are in addition to the written comments the Port provided on March 7, 2011, before the second fireworks workshop held on March 11, 2011. We appreciate your office's continuing efforts in working with the numerous stakeholders to obtain input on this important community issue. The Port has reviewed the revised Tentative Order and has the following comments at this time. The Port may offer additional comments at the public hearing scheduled on May 11, 2011.

The Port appreciates your clarification in the revised Tentative Order that the NPDES permit must be obtained by "*Any person discharging* pollutant wastes associated with the public display of fireworks . . ." (Tentative Order, Table 1, Discharger Information, emphasis added), instead of an event "sponsor". This alleviates our previously stated concern that persons other than the actual discharger or organizer of an event must apply for a permit, and therefore be required to assume legal liability for another party's actions over which they have no control. For example, there are numerous local monetary "sponsors" of fireworks shows, who merely donate funding to those who put on the shows. Monetary "sponsors" such as the Port have no involvement in or control over the displays and do not "discharge" the fireworks. Therefore, they should not be subject to the Tentative Order. Should that occur, many monetary sponsors may choose to withdraw their support, which would jeopardize the ability of the shows to continue.

Mr. David W. Gibson  
Ms. Michelle Mata  
Page 2  
April 20, 2011

However, we request that this clarification be uniform throughout the Tentative Order and all references to show "sponsors" or "hosts" be deleted or clarified so the permit obligation clearly applies solely to the actual discharger or show organizer, and excludes organizations or persons that merely donate funds for the presentation of fireworks shows. For example, Section II.G of the Tentative Order refers to "sponsor", as well as Attachment F.II.F (which could be replaced by "Discharger"). Similarly, Attachment B.II has the prior draft language referring to the obligations of "sponsors", which should be revised (and potentially replaced by "organizer"). There are many other references to "sponsors" throughout the Tentative Order, which are not listed here. Also, Section II.B and Attachment F.II.A refer to the obligations of a "host" (which could potentially be defined or replaced by "organizer").

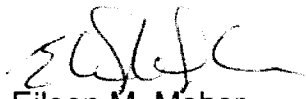
The Port also has the following comments on the draft Monitoring and Reporting Program (Attachment E, Section IX):

1. Section IX.A.1.a, Category 1 Discharger Criteria defines which discharges are subject to monitoring. The Port recommends that this definition include discharges to surface waters which can flow into or are adjacent to San Diego Bay.

2. In Section IX.A.2, Category 1 Dischargers are encouraged to establish or join water body monitoring coalitions for San Diego Bay and/or Mission Bay. As you know, these bays have been sampled at regular intervals for the last 15 to 20 years through the Bight Program and, as a result, have established a solid baseline of water and sediment conditions. The Port recommends, in lieu of the proposed monitoring coalition, that dischargers contribute to the regional Bight monitoring program.

The Port looks forward to continuing its work with the Regional Board and the numerous stakeholders on these issues. If you have any questions, please contact me at (619) 686-6254.

Sincerely,



Eileen M. Maher  
Assistant Director  
Environmental & Land Use Management

EMM: rlg  
File: Fireworks  
cc: Darlene Nicandro

Docs #458059

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April 20, 2011

VIA ELECTRONIC MAIL  
AND REGULAR MAIL  
David W. Gibson, Executive Officer  
c/o Michelle Mata [mmata@waterboards.ca.gov](mailto:mmata@waterboards.ca.gov)  
San Diego Regional Water Quality Control Board  
9174 Sky Park Court – Suite 100  
San Diego, CA 92123

**In reply refer to:**  
Reg. Measure ID 375971: MMATA  
Place: 656901

**Re: Comment Letter in advance of 05/11/2011 Board Hearing**

Dear Executive Director Gibson and Honorable Board Members:

This law firm represents the interests of the National Fireworks Association (“NFA”), and on its behalf we thank you for the opportunity to submit additional written comments to Tentative Order No. R9-2011-0022, NPDES Permit No.CAG999002 (the “Tentative Order”).<sup>1</sup> The implementation of the Tentative Order by the San Diego Regional Water Quality Control Board (“Board”) will undoubtedly cause undue hardship and economic injury to every member of the NFA working within the areas that would become subject to this Board’s jurisdiction without, in return, any assurance that these sacrifices will result in a measurable or meaningful benefit to the water quality of the receiving waters that are the subject of the Tentative Order. Indeed, the Board has failed to produce any scientific or technical study substantiating its suspicion that public fireworks displays are a proper subject of its regulatory powers pursuant to the federal Clean Water Act (the “CWA”), the statute that the Board relies upon as a source of its powers. Accordingly, the NFA submits this letter response in connection with the March

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<sup>1</sup> In prior response letters the Tentative Order was referenced as Tentative Order no. R9-2010-0124, the number initially assigned to the matter.

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21, 2011 Notice of Public Hearing (the "Public Hearing"), presently scheduled for May 11, 2011; and the NFA also incorporates by reference the facts and arguments contained in its previously-submitted letter responses dated, respectively, December 9, 2010, and March 7, 2011<sup>2</sup>.

Although the NFA is equally interested in protecting the environment, it steadfastly maintains that the Board lacks the authority to regulate public fireworks displays. The NFA believes the line of questioning starts with deciding whether or not a public fireworks display is an activity that is amenable to regulation by the Board under the CWA and, if so, whether or not the activity exceeds actionable levels. The NFA contends that the answer to these questions is 'NO', for the following reasons.

The Activity Is Not Subject To Regulation Under The CWA

Significantly, the Board continually admits that it remains unable to "precisely specify the point(s) at which fireworks residue becomes a pollutant waste.,"; see, *Limitations and Discharge Requirements*, at Section III A, at page 10. Here, the Board's failure to provide a full and accurate description of the activity it seeks to regulate casts serious doubt upon whether fireworks residue legitimately and lawfully constitutes "pollutant waste" or, rather, is just a term the Board prefers to use in the Tentative Order. For purposes of completeness, fireworks are commonly defined as finished products that are designed to be propelled into the atmosphere whereupon they produce an audible or visible effect, or both. Furthermore, fireworks are designed to self-consume, leaving little or no residue, let alone any 'pollutant waste'; for the record, the NFA objects to the term 'pollutant waste' in the context of fireworks displays since some fireworks components are more commonly described as 'hazardous material', not 'hazardous wastes'. In any event, the Board's inability to fully and completely describe the activity over which it wants to exercise its regulatory powers raises valid concerns that the Board may be acting prematurely and without justification. The lack of precision on the Board's part also prejudices persons that may be affected by the Tentative Order, such as the NFA, by denying them a full and fair opportunity to respond to a complete set of facts. For these reasons, the Tentative Order should be withdrawn until a reliable set of facts becomes available for public review and comment.

As the NFA previously explained, the unique qualities of fireworks displays also separates this activity from other activities that fit comfortably within the Board's regulatory powers, such as sewage treatment plants, wastewater treatment facilities and local marinas. By distinction, fireworks displays sites are, with rare exception, temporary; and fireworks displays are, invariably, of relatively short duration (generally less than 20 minutes). Also, many fireworks displays occur only once a year in connection with celebrating the Fourth of July or New Year's Eve. By further distinction, activities commonly regulated under the CWA involve both the collection of

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<sup>2</sup> The NFA takes this occasion to amend its March 7, 2011 letter response to correctly indicate that it is submitted on behalf of the National Fireworks Association in response to Tentative Order no. R9-2011-0022, rather than Tentative Order no. R9-2010-0124.

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wastes and its conveyance (in aqueous form) through a discernable, discrete conduit such as a pipe, tunnel, channel or ditch; none of these factors are present in the operations of a fireworks display.

The Activity Does Not Exceed Actionable Levels

The Board also openly admits that “[w]ith the exception of perchlorate and bis-phthalate, water chemistry sampling...to date showed little evidence of pollutants within the receiving water column at levels above applicable water quality criteria or detected reference site levels.”<sup>3</sup>; and it goes on to admit that “[t]here are currently no water quality criteria for perchlorate and bi-phthalate.” see, Attachment F- Fact Sheet, at pages F-11 and F-12. To summarize, none of the data evaluated by the Board has produced results exceeding recognized water quality criteria, demonstrating that there is no discernible or immediate need to regulate this activity.

The available data cited by the Board weighs heavily against burdening sponsors of fireworks displays—oftentimes, governmental organizations and non-profit entities—with excessive enrollment and filing fees and sophisticated, and even more costly, water monitoring protocols. This is especially inappropriate where, like here, there is no scientific and engineering research or test results demonstrating or concluding that fireworks displays are harmful to the receiving waters that are the subject of the Tentative Order. The only seeming exception to this general rule concerns fireworks displays on par with the magnitude and frequency of displays by SeaWorld, a singularly unique corporate citizen that, incidentally, is already subject to NPDES regulation. Notwithstanding, the NFA contends that current guidelines identify no discernible need for the Board to regulate any person other than SeaWorld or other persons producing fireworks displays on par with the magnitude and frequency of SeaWorld.

The Known Costs Of The Tentative Order Outweighs The Unknown Benefits

It is worth repeating that the requirements of the Tentative Order are not proportional to the activity sought to be regulated, even after the Board modified the provisions such that only sponsors qualifying as Category 1 Dischargers are required to perform sophisticated and expensive monitoring of water quality. An unintended consequence of the Board’s modification (to its proposed water quality monitoring requirements) will be the loss of large fireworks displays in Mission Bay and San Diego Bay due to the fact that the additional monitoring costs associated with these large displays will vastly outweigh the benefits to be derived.

The NFA also registers its objections to the Tentative Order to the extent that subjecting public fireworks displays to the NPDES program will cause irreparable damage to the industry and, most likely, its members with local interests and customers. The direct loss of revenues and jobs can, and will, be measured in the tens of millions of dollars in terms of lost earnings and salaries, in addition to the tens of millions of dollars

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<sup>3</sup> Inexplicably, the 3/21/2011 version omits ‘Zinc’ from the list of exceptions; nonetheless, this fact supports the NFA’s argument that no regulation is required by the Board.

**THE CREADORE LAW FIRM P.C.**

that will not flow into the cash registers of local businesses that derive substantial annual revenues from fireworks displays in Mission Bay and San Diego Bay (e.g., bars, restaurants, charter boats and ferries, hotels and taxis). It would also stand to argue that these revenue streams dwarf any monies that government expects to realize from enrollment fees and filing fees or, more importantly, any benefit to the water quality of the receiving waters that are the subject of the Tentative Order. The Board also appears to be overlooking the entertainment value and community spirit that public fireworks displays engender which, suffice to say, is priceless.

Conclusion

The NFA remains ready to assist this Board in achieving responsible regulation, and to that end it urges the Board to act judiciously and prudently by deferring the current deadlines while further study of the available data, as well as the prevailing science, law and public policy, is undertaken. In addition to the foregoing comments and prior communications, the NFA expressly reserves all rights and remedies to challenge the actions of the California Regional Water Quality Control Board, San Diego Region.

Respectfully submitted,  
THE CREADORE LAW FIRM, P.C.  
*Attorneys for the National Fireworks Association*

  
\_\_\_\_\_  
Donald E. Creadore





2727 HOOVER AVE., SUITE 202 • NATIONAL CITY, CA 91950 • (619) 474-0220 • WWW.ENVIRONMENTALHEALTH.ORG

April 20, 2011

Chairman and Boardmembers  
San Diego Regional Water Quality Control Board  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123

Via Email [mmata@waterboards.ca.gov](mailto:mmata@waterboards.ca.gov)

**RE: Tentative Order No. R9-2011-0022, NPDES Permit No. CAG999002 General Water Discharge Requirements for Discharges Associated with Public Displays of Fireworks to Surface Waters in the San Diego Region**

Dear Chairman and Regional Board Members:

Environmental Health Coalition (EHC) is a 30-year old environmental justice organization working to protect community and environmental health from toxic pollution. EHC has participated in the public workshop and commented on the draft Order. Unfortunately, we cannot support the Tentative Order as it has been weakened to a point where it will not provide protection for water quality. The specific allowance of pollution into an ASBS and removal of monitoring for some events, and the creation of the threshold all weaken the permit so that it does not adequately regulate these discharges.

We are very concerned that the current Tentative Order allows discharges of waste into ASBS waters in clear violation of the applicable Ocean Plan prohibitions. We urge the Board not to succumb to the pressure of 'tradition' as the rationale to violate policies that have been thoughtfully developed and determined to be necessary. There are many 'traditions' that we used to have (e.g. spraying public beaches with DDT to keep the insects down, releasing 1,000s of plastic, non-biodegradable balloons over the ocean for special events, throwing rice at weddings) that we have learned to change to reduce our impact on the environment. Fireworks over water is the next tradition that needs re-thinking.

Our reading of the Fact Sheet demonstrates that the monitoring at Sea World, where BMPs were apparently used, showed adverse water quality impacts in Mission Bay waters and sediments. Based on these results, it is not logical to assume that BMPs will prevent Water Quality impacts in ASBS waters, an assumption further unverifiable due to lack of specifically required monitoring.

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EMPODERANDO A LA GENTE. ORGANIZANDO A LAS COMUNIDADES. LOGRANDO LA JUSTICIA.**

In addition, the Sea World monitoring program was not robust/sophisticated enough to assess the magnitude of water/sediment quality or impacts. Yet, even so, that admittedly inadequate program still evidenced water quality problems. So, it is irrational to extrapolate those results to the discharges over ASBS waters, concluding that untested BMPs will prevent impacts to natural water quality, without verification through monitoring.

The good news is that this source of pollution to our precious waters is fully avoidable! Millions of Americans enjoy fireworks shows on the 4<sup>th</sup> of July without polluting their local waters. They hold them in parks, parking lots, amphitheaters, and many other locations. The Regional Board should recognize that this is a fully avoidable discharge of waste to waters and prohibit it.

EHC supports the comments and recommendation of the Coastal Environmental Rights Foundation and urges you to restore the meaning to this permit.

Our position remains: Pollution is pollution. Toxic chemicals are toxic chemicals. Discharge of them into our waterways is not appropriate when it can be easily avoided. We are confident that in the greatness of our nation we are not so limited that we cannot learn to celebrate without polluting our precious waters. It is critical that the permitting, reporting, and monitoring provisions of the original draft permit be maintained until the full impacts of these discharges are understood.

Sincerely,



Laura Hunter

cc. Michelle Mata



**Michelle Mata - Agenda**

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**From:** Tom Kirwan <cvyc06@gmail.com>  
**To:** <rb9agenda@waterboards.ca.gov>  
**Date:** 4/23/2011 9:53 AM  
**Subject:** Agenda

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To: San Diego Water Board  
Re: Agenda Item 6

NPDES General Permit: Residual Firework Pollutant Waste Discharges to Waters of the United States, San Diego Region (Tentative Order No. R9-2011-0022, NPDES Permit No. CAG999002) (Michelle Mata)

The approach toward rational application of environmental criteria as shown in proposed objectives for the basin plan would be appropriate to this issue.

You have already heard from Pyro Spectaculars that the existing law and standards are satisfactory and the proposed Management Practices are inconsistent with existing regulations.

The Port of San Diego has determined that the proposed regulations conflict with existing regulations and they place responsibility on entities not controlling events.

The La Jolla Fireworks Foundation contends the Board has no authority under existing regulations.

The Nation Fireworks Foundation has testified to the following:

- Board exceeds mandate and authority
- Lack of tests showing adverse effects
- Requirements vastly disproportionate to regulated activity
- Irreparable damage to industry and employees
- Direct loss of substantial revenue to participating communities
- Board unable to identify point at which fireworks residue becomes pollutant waste
- Board confusing term 'hazardous waste' with term 'hazardous material' which is traditional treatment by users.
- Board fails to thoroughly and unambiguously define the activity to be regulated

Fireworks & Stage FX America contends that the Board has brought no evidence of significant environmental pollution and that scientific evidence gleaned nationwide shows no ecological harm. The Mayor of San Diego, Jerry Sanders has stated the proposed regulations have the potential for damaging consequences that set a national precedent.

The regulations would produce an effective ban because of limited funds of sponsors.

Fireworks have never been considered a point source discharge in 40 year history of Clean Water Act.

The Board has produced no evidence of any negative impact on water quality.

In light of the above, I feel it would not be a rational move by the Board to implement the proposed regulations.

Thank you,

Tom Kirwan  
Big Bay Boater

