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For Petitioners National Fireworks Association and Fireworks & Stage FX America, Inc.

BEFORE THE CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of 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;)
California Regional Water Quality Control Board -)
San Diego Region; San Diego Region Order No.)
R9-2011-0022, NPDES No. CAG999002)

PETITION FOR REVIEW
OF ORDER R9-2011-0022

REQUEST FOR HEARING AND
STAY FILED CONCURRENTLY

Pursuant to Section 13320 of the California Water Code and Section 2050 of Title 23 of the California Code of Regulations (“CCR”), the National Fireworks Association (“NFA”) and Fireworks & Stage FX America, Inc. (“Fireworks America”) (sometimes collectively referred to as the “Petitioners”) petition the State Water Resources Control Board (sometimes “State Water Board”) to review and rescind the determination of the California Regional Water Quality

PETITION FOR REVIEW

Control Board for the San Diego Region (“Regional Board”) to adopt a General 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, San Diego Region, Order No. R9-2011-0022, NPDES No. CAG999002 (the “Order”); the disputed action occurred during a hearing convened on May 11, 2011(the “Petition”). The issues raised in this Petition were properly raised before the Regional Board.

Petitioners request the opportunity to file supplemental points and authorities in support of this Petition once the administrative record becomes available, while also reserving the right to submit additional arguments and evidence in reply to any and all responses to this Petition.

In addition, prior to the State Water Board ruling on this Petition, it is respectfully requested that the State Water Board hold evidentiary hearings. It is also respectfully requested that the State Water Board grant an immediate stay of the Order.

INTRODUCTION

This is a Petition for Review and Request for Stay pursuant to Water Code §§ 13320 and 13321 and Title 23, California Code of Regulations §§ 2050 and 2053. Petitioners, the NFA and Fireworks America, seek review, and a stay, of the first-in-the-nation actions taken by the Regional Board during a hearing convened on May 11, 2011, resulting in the Order. Petitioners seek to have the Order rescinded in its entirety and, to that end, further request a full evidentiary hearing before the State Water Board.

The Petitioners are, generally speaking, in accord with the Regional Board’s description of local public fireworks displays that are the subject of this matter.

Public displays of fireworks have been occurring throughout the year at various locations within the San Diego Region as part of national and community celebrations and other special events. Located within the

San Diego Region are entertainment theme parks and two major league stadiums for football and baseball that use fireworks displays during regular activities and special events. Additionally, fireworks displays and pyrotechnics special effects are periodically used in other venues such as business grand openings and special events, public and private school homecoming and graduation events, various sporting events and local fairs. The most significant and widespread use of fireworks displays for celebrations in the San Diego Region are for annual Fourth of July and New Year's Eve public and private events
Order No. R9-2011-0022, at page 5.

The Order subject to review expressly declares that: “[t]his General Permit regulates discharges of residual pollutant wastes which are fireworks constituents or breakdown products that are present after the use of the fireworks for public display.” This Petition challenges the actions of the Regional Board on the grounds that they are arbitrary and capricious and not supported by credible evidence, as well as improper as a matter of law. Furthermore, the U.S. EPA, no other State, and eight of the nine Regional Boards have taken no similar action, and never before have public fireworks displays been found to qualify as a discharge of a pollutant waste from a point source into the water within the purview of the Clean Water Act, 33 U.S.C. §1251 *et seq.* (the “CWA”). Petitioners request that the State Water Board conduct a full evidentiary hearing so that the issues raised by the Petitioners can be fully addressed. Petitioners further request that the State Water Board stay the implementation of the Order pending hearing and determination of this Petition.

Pursuant to California Code of Regulations, Title 23, § 2050(a), Petitioners furnish the following information:

1. NAME AND ADDRESS OF THE PETITIONERS:

National Fireworks Association
8224 NW Bradford Ct.
Kansas City, Missouri 64151
Attn: Joseph Bartolotta, President

and

Fireworks & Stage FX America, Inc.
P.O. Box 488
Lakeside, CA 92040
Attn: Joseph Bartolotta, President

With copies to:

Donald E. Creadore, Esq.
The Creadore Law Firm, PC
305 Broadway, 14th Floor
New York, NY 10007

2. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD WHICH THE PETITIONERS REQUEST THE STATE WATER BOARD TO REVIEW:

Petitioners request the State Water Board to review the Regional Board's adoption of Order No. R9-2011-0022; and attached is a true and correct copy.

3. THE DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED TO ACT OR ON WHICH THE REGIONAL BOARD WAS REQUESTED TO ACT:

a. May 11, 2011

4. A FULL AND COMPLETE STATEMENT OF THE REASONS THE ACTION OR FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER:

STANDARD OF REVIEW

In *California Correctional Peace Officers' Association v. State of California*, 181 Cal. App. 4th 1454, 1459 105 Cal. Rptr. 3d 566, 570 2010 Cal. App. LEXIS 170 (2010), the Court of Appeal of California, First Appellate District, Division Four, recently observed that:

The 'arbitrary, capricious and unsupported by evidence' standard applies to a review of the substantive merit of an administrative agency's quasi-legislative act—that is, whether the agency "reasonably interpreted the legislative mandate." (*Credit Ins. Agents Assn. v. Payne*, 16 Cal. 3d 651, 657 [128 Cal. Rptr. 881, 547 P.2d 993].) However, when the agency's action depends solely upon the correct interpretation of a statute, a question of law, we exercise our independent judgment." (citations omitted).

Here, the State Water Board should exercise its independent judgment and determine that the Order is not sustainable as a matter of law and, consequently, the Order must be rescinded.

I. POINTS AND AUTHORITIES:

OVERVIEW

The type of fireworks commonly used in public fireworks displays are finished manufactured products that are designed and intended to be launched into the atmosphere whereupon they create an audible or visible effect, or both. The Regional Board has determined that the "[t]ypical" fireworks display is approximately six (6) minutes in length. See Order, Table 5, at page F-37. The Regional Board has also ruled that "[t]he most significant and widespread use of fireworks displays for celebration in the San Diego Region are for annual Fourth of July and New Year's Eve public and private events", Order at page 5, affirming that fireworks

displays are also infrequent in occurrence. To summarize, the Regional Board seeks to regulate an activity characterized as being infrequent, temporary and relatively short in duration.

Petitioners argues the Regional Board, as a matter of law, has no jurisdiction over public fireworks displays due to the fact that public fireworks displays do not (1) constitute a discharge of a (2) pollutant from (3) a point source directed (4) into the water within the purview of the CWA. Instead, public fireworks displays use finished products that are designed and intended to be “discharged into the air”, to use the words of the Regional Board, whereupon they create an audible or visible effect.

Petitioners also argue that the Regional Board has acted in an arbitrary and capricious manner in setting standards and obligations pertaining to public fireworks displays based upon data from only one source, SeaWorld, San Diego (“SeaWorld”), and without substantiation of any environmental need requiring its action in the form of a general permit, as well as in the face of the undisputed fact that fireworks constitute the lowest threat to the environment and are, accordingly, codified as a Category 3C pollutant¹.

Since its initial introduction in September 2010 (as R9-2010-0124)², the Order has become so riddled with carve-outs that it now effectively exempts the vast majority of fireworks displays that occur in the region from most of its obligations, with the exception that everyone will now be obligated to remit a \$1,452 permit fee and submit a post-display report. As a result, there is little to no discernible benefit to water quality to be gained by its implementation since it essentially maintains the status quo and seeks to regulate an activity that presents, in accordance

¹ Defined by 23 CCR 2200(b)(8) as requiring no treatment system and “[p]oses no significant threat to water quality.” Order, Section F, at p. F-8

² The Order is the fourth iteration, having gone three prior revisions on, variously, September 23, 2010, February 8, 2011 and March 21, 2011

with the Regional Board's designation of Category 3C status, no significant threat to the environment.

With respect to the issue of water quality monitoring, due to the Regional Board's generous use of carve-outs the Order requires only SeaWorld to satisfy all of the monitoring provisions that, not coincidentally, are substantially similar in scope to the monitoring protocol that SeaWorld has conducted since at least 2005; pursuant to a prior individual (NPDES) permit issued by this Regional Board in 2005, SeaWorld is authorized to perform up to 150 displays annually, all within a shallow enclosed bay with restricted circulation. Since SeaWorld is thoroughly familiar with performing water quality monitoring the Order will impose no additional burden upon it; however, instead of continuing under an individual permit exclusive to it, SeaWorld is to become an enrollee under the general permit. Accordingly, it is evident that the Regional Board has deliberately elected to do little, if anything, in terms of changing the scope or manner of water quality monitoring in the region, thereby preserving the status quo. The fact that the Order continues the status quo calls into question the efficacy and legitimacy of the actions of the Regional Board in terms of implementing a general permit where no need exists. A more eloquent solution would involve the Regional Board merely extending the individual permit it had issued to SeaWorld; this solution also presents the path of least resistance.

Petitioners also register their objection to the Regional Board's determination to apply the discharge standards that pertain to Mission Bay and San Diego Bay to all other areas, especially in light of the Regional Board's express appreciation that not all bodies of water are identical in nature and purpose. In other aspects, the position of the Regional Board as expressed in the Order contradicts the opinions expressed by the Office of Chief Counsel, exhibiting a lack of

clarity and definiteness while also causing needless confusion. For example, the Regional Board has expressly stated that the Order does not equate fireworks with ammunition (e.g., bullets), whereas the Office of Chief Counsel asserts that fireworks and bullets are alike. Similarly, while the Order does not identify a point source the Office of Chief Counsel has; it identifies the mortar tube as the point source despite the fact that this item is not amongst the items enumerated in the statutory definition of point source.

The foregoing examples illustrate some of the incongruities and inconsistencies found in the Order, requiring a finding that the Regional Board's actions are arbitrary and capricious as well as entirely bereft of evidentiary support, in addition to being improper as a matter of law. A full review of the Order leads one to find no discernible improvement to water quality is either described or to be expected by the Regional Board through its implementation of the Order; instead, it would appear that the Regional Board is more interested in the revenues it projects to be generated through the collection of substantial fees. See, Order at page F-37. The Order also threatens all 2011 Fourth of July displays due to the substantial increase in costs and unrealistic deadlines, as well as all subsequent Fourth of July and New Year fireworks displays.

II. THE REGIONAL BOARD'S EXERCISE OF JURISDICTION OVER PUBLIC FIREWORKS DISPLAYS MUST BE REVERSED AS A MATTER OF LAW

1. Public Fireworks Displays Do Not Qualify As Point Sources

a. The Regional Board Is Unable To Specify The Point Source, Mandating Rescinding The Order

The CWA defines point source as meaning "any discernible, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362 (14).

It is well-settled that the identification of a point source is a prerequisite to any subsequent finding that a particular discharge is governed by the Act, 33 U.S.C. §§1251, et seq., subjecting it to NPDES permitting. See, 33 U.S.C. §1362(12); see also, *Ecological Rights Foundation v. Pacific Gas & Elec. Co.*, et al., 2011 U.S. Dist. LEXIS 37230, at *18 (N.D. Cal., Oakland Division, March 31, 2011) (lack of a point source discharge is, standing alone, fatal to...CWA claims); *U.S. v. Plaza Health Labs., Inc.*, 3 F.3d 643, 645 (2nd Cir., 1993) (discharge from a point source is an essential element [for a violation under the CWA]); *Nat'l Wildlife Federation, et al. v. Gorsuch*, 224 U.S. App. D.C. 41, 55 (1982) (the NPDES system [is] limited to addition of pollutants from a point source (internal quotes omitted)).

As an initial observation, the Order expressly states that the General (NPDES) Permit “covers the point source discharge of residual firework pollutant waste...resulting from the public display of fireworks”, Order, at page 6; but, inexplicably, never goes on to unequivocally identify any point source(s) associated with public fireworks displays. Due to the Regional Board’s silence regarding this essential detail—the identity of the point source that confers CWA jurisdiction for all fireworks shows, coastal or inland—the Order is legally deficient. Under the facts and circumstances, there is no justification for excusing the Regional Board’s failure to expressly identify, in the Order, the point source relating to public fireworks displays within either the spirit or meaning of that term under the CWA. Accordingly, the Order should be rescinded due to its failure to identify the subject point source with requisite clarity and definiteness, as well as to ensure that standards of due process are met.

The Order also suffers from the fact that certain pronouncements in the Order are at odds with the express writings of Office of Chief Counsel for the State Water Resources Control

Board (the “Chief Counsel Letter”).³ Specifically, in the Order the Regional Board describes fireworks as being “discharged into the air”, Order, at p. F-42, and it contents “scattered”, Id., at page 5, while, in the process, “producing audible, visible, mechanical or thermal effects,” Id., at page A-4. By contrast, the Chief Counsel Letter identifies the point source as “[t]he device that set off the fireworks”, presumably the mortar tube situated at the display site. Petitioners assert that sharp differences of opinion between the Regional Board and its Office of Chief Counsel regarding the purported identity of the “point source” for public fireworks displays cannot be reconciled at this juncture and demands a full investigation to determine which of the two divergent positions is valid. This is especially true where EPA, no other State or Regional Board has ever found fireworks to qualify as a point source discharge of a pollutant into the water. At a minimum, this circumstance mandates a hearing as well as a stay of enforcement in the event the Order is not rescinded outright due to the Regional Board’s express inability to discern the point source with requisite precision and definiteness.

Fatal to the Order’s continuance is the fact that courts have consistently refused to enforce NPDES regulations where there is a failure to explicitly describe a discernible point source (and provide findings in support). In conclusion, the Regional Board’s inability to specify the point source in the Order means that it cannot satisfy an essential element of the provisions of the CWA, presenting proper grounds to rescind the Order as a matter of law.

b. At Best, Public Fireworks Displays Qualify As Discharges From A Non Point Source

The fact that the Regional Board is unable to identify a “point source” (relating to public fireworks displays) is not surprising when one also considers that, by its very nature, the definition of point source contemplates, indeed certifies, that not all discharges qualify as point

³ Although not expressly part of the Order, the Regional Board has submitted into the record, as ‘Item No. 6. Supporting Document No. 6’, a letter issued, at its request, by the Office of Chief Counsel, dated April 20, 2011.

source discharges. Instead, there are by necessity countless instances where a discharge occurs from a non-point source, placing the discharge and all associated activities outside the purview of the CWA. This proposition was recently mentioned in *Ecological Rights Foundation v. Pacific Gas and Electric Company*, 2011 U.S. Dist LEXIS 37230 (N.D., Cal. 2011):

The CWA distinguishes between point and nonpoint sources. See *Or. National Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008). (The CWA's disparate treatment of discharges from point sources and nonpoint sources is an organizational paradigm of the Act.). A point source is defined as *any discernible, confined and discrete conveyance*, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. 33 U.S.C. § 1362 (14) (emphasis added) All other sources of pollution are characterized as nonpoint sources. See *Or. Natural Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 849, n. 9 (9th Cir. 1987)" (underline supplied). An [sic] NPDES permit is required for discharges from point sources, but not for nonpoint sources. See *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002). (internal quotation mark omitted)(underline supplied)

Here, Petitioners assert that the launching of display fireworks into the atmosphere, wherever geographically (inland or coastal), does not constitute a point source discharge within the spirit or plain meaning of the CWA and, consequently, the public display of fireworks is not subject to NPDES permitting. At best, public fireworks displays qualify as a "source of pollution characterized as [a] nonpoint source[].", even assuming that a discharge of pollutants within the meaning of that particular term actually occurs, something that Petitioners also dispute for the reasons that follow in point 4, below.

In 1972, Congress passed amendments to the CWA, including adding the term 'point source'; and in passing on the distinction between point and non-point source during the legislative debate that ensued, Senator Robert Dole (R. Kansas, Ret.) opined:

Very simply, a non-point source of pollution is one that does not confine its polluting discharge to one fairly specific outlet, such as a sewer pipe, a drainage ditch or a conduit . . .

The various courts that have analyzed the characteristics of a “point source” are in direct alignment with the statements expressed by then Senator Dole. As part of the ‘point source/nonpoint source’ analysis, courts have expressed an understanding that “point and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather *whether the pollution reaches the water through a confined, discrete conveyance.*” *Northwest Environmental Defense Center v. Brown*, 617 F.3d 1176, 1182, 2010 U.S. App. LEXIS 17129 (9th Cir. 2010), citing, *Trustees for Alaska v. EPA*, 749 F.2d 549 (9th Cir. 19824); accord, *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1978) (italics in original). In *Northwest Environmental Defense Center, et al v. Brown*, the Ninth Circuit ruled that a pollutant comes from a point source if it is “collected in a system of ditches, culverts, and channels and then is discharged” into water, *Id.*, at 1196; see also, *Cordiano, et al. v. Metacon Gun Club, Inc., et al.*, 575 F.3d 199, 221 (2nd Cir. 2009) (“to be sure, the CWA does generally contemplate that discharges be ‘channelized’ [sic] in order to fall within the EPA’s regulatory jurisdiction; that is why the term ‘point source’ is defined as ‘discrete, discernible, conveyances.’” (quotes in original); quoting *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 510 (2^d cir. 2005)); *Ecological Rights Foundation v. Pac. Gas & Elec.*, 2011 U.S. Dist. LEXIS 37230, at 16 (storm water which runs off from a surface is a point source discharge whenever it is channeled and controlled through a discernible, confined and discrete conveyance. . . (internal quotation marks and internal citation removed) and (“the text of § 401 [of the CWA] and the case law are clear that some type of collection or channeling is required to classify an activity as a point source.”), quoting, *Greater Yellowstone Coal v. Lewis*, 628 F.3d 1143, 1153 (9th Cir. 2010)).

Not surprisingly, EPA's explanation of non-point source is in synch with legislative and judicial interpretation. For example, the EPA Office of Water, in Nonpoint Source Guidance 3 (1987) (the "EPA Guidance"), specifically states:

In practical terms, nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation.

In describing the public fireworks display occurring near the La Jolla ASBS (since 1984) the Regional Board explicitly states that "pyrotechnics material is discharged into the air...", Order, at page F-42, and in another passage states: "[t]he chemical constituents within the fireworks are scattered by the burst charge, which separates them from the fireworks casing and internal shell components", Id., at pages 5 and 10. It is both fair and reasonable to assume that the Regional Board would describe all other public fireworks displays in similar fashion. Indeed, it is beyond cavil that the entire process as described by the Regional Board inexorably leads one to conclude that public fireworks display involves fireworks being "discharged into the air".

It is most ironic that reference to the Regional Board's own description (of the process of public fireworks displays) establishes that the contents of fireworks, "pyrotechnic materials", are "scattered", confirming the obvious fact that fireworks are not susceptible to being controlled or channeled or subject to confinement. By its very nature, public fireworks displays cannot reasonably or rationally be defined as involving a "discernible, confined and discrete conveyance.", all of which are prerequisites to regulation under the CWA.

Importantly, courts are further sensitive to the reality that "the phrase discernible, confined and discrete conveyance cannot be interpreted so broadly as to read the point source requirement out of the statute." See, Cordiano v. Metacon Gun Club, Inc., (2d Cir. 2009) 575 F. 3d 199 citing, U. S. v. Plaza Health, 3 F.3d 643 646, 1993 U.S. App. LEXIS 22414 (2d Cir.

1993) (internal quote marks removed). It is evident that a measure of restraint has to be exerted when interpreting and determining the contours and limits of the phrase “discernible, confined and discrete conveyance”, in similar fashion that restraint has been shown by the courts in finding that not all sources of pollution can be characterized as point sources. See, *Ecological Rights Foundation v. Pacific Gas and Electric Company*, 2011 U.S. Dist LEXIS 37230 (N.D., Cal. 2011) citing *Or. Natural Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 849, n. 9 (9th Cir. 1987).

In conclusion, the foregoing arguments sufficiently demonstrate that public fireworks displays do not share the qualities of other activities that may be characterized as a discernible confined and discrete conveyance and, at best, qualify as a non-point source falling outside the scope of the CWA. Accordingly, the Order should be rescinded as a matter of law.

c. Mortar Tubes Used For Public Fireworks Displays Are Not Point Sources

Petitioners further note for the record that mortar tubes are not expressly mentioned amongst the items expressly enumerated as a point source in the relevant statute (i.e., pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft). See, 33 U.S.C. § 1362 (14). One likely reason for the omission arises from the fact that the variety of mortar tubes used in public fireworks displays are plugged at one end, effectively preventing any matter from traversing it. The fact that nothing enters one end and exists through the other end negates any suggestion that the contents of the mortar tube (display fireworks) are, in actuality, pollutants being “channelized” from one point to another point leading into the water. As the Regional Board also appreciates, the mortar tube is angled towards the sky and not directed towards a water body, seemingly undermining the opinion of Chief Counsel that the mortar tube is a point source.

At best, the mortar tube qualifies as a non-point source for the foregoing reasons. Petitioners further note that if Congress had wanted 'mortar tube' to be regulated as a point source under the CWA it could have added 'mortar tube' to the other items expressly enumerated under the relevant statute. Certainly, in the 40 years that NPDES permitting has been a national program EPA could have taken such action on its own initiative, but has elected not to.

The foregoing facts and arguments present a proper basis to determine that, at best, public fireworks displays qualify as a non-point discharge and, as a result, the Order should be rescinded.

2. Public Fireworks Displays Are Not Associated With Industrial Activity

The Regional Board appreciates the undeniable fact that public fireworks displays constitute a legitimate and widely-popular form of political speech (e.g., Fourth of July) and entertainment. See, Order at page 5; in fact, the Regional Board expressly refers to the government classification for "[a]musement and Recreation Services (SIC Code: 7999)". See, Order, Table 2, at F-22. The Regional Board also has expressly stated that "[t]he Tentative Order does not contain language that concludes that fireworks displays involve a process of production or manufacturing." See, Responses to Significant Comments to Order No. R9-2010-0124 (Released 9/23/2010), identified by the Regional Board as Item No. 6, Supporting Document No. 7, at 'i' on page 35-36 (the "Responses to Significant Comments"). These actions by the Regional Board are consistent with the fact that while it is oft-cited that the scope of the CWA may be broadly interpreted, it is not without limitation; indeed, non-point source designation applies to a group of activities that for one reason or another are not subject to CWA regulation. See, *Ecological Rights Foundation v. Pacific Gas and Electric Company*, 2011 U.S. Dist LEXIS

37230 (N.D., Cal. 2011) (“[a]ll other sources of pollution are characterized as “nonpoint sources”).

Generally speaking, CWA point-source designation has been customarily extended to industrial and municipal activity, such as sewage treatment and waste water treatment, *see, e.g., USA v. Plaza Health Laboratories, Inc.*, 3 F.3d 643 646, 1993 U.S. App. LEXIS 22414 (2d Cir. 1993) (“[]the Clean Water Act generally targets industrial and municipal sources of pollutants, as evident from a perusal of its many sections. Consistent with this focus, the term “point source” is used throughout the statute, but invariably in sentences referencing industrial or municipal discharges.”), *cf. San Francisco Baykeeper v. Tidewater Sand & Gravel*, 1997 U.S. Dist. LEXIS 22602 (U.S.D.C., N.D.Cal. 1997)(waste produced during leaching activities proper subject of NPDES regulation); and logging, *see, EPIC v. Pacific Lumber*, 469 F. Supp. 2d 803, 821 (9th Cir. 2007) (court disagreed with lumber company’s argument that features of logging road (e.g., culverts, ditches) are BMPs, and that devices designed to lessen runoff could never be a point source in finding that “[w]hen a device or system designed to channel or diffuse runoff fails and instead channels runoff into a navigable water, the points of failure can be considered point sources.”); and mining, *see, USA v. Earth Sciences*, 599 F.2d 368, 374, 179 U.S. App. LEXIS 14485 (10th Cir., 1997)(gold mining operations was viewed as closed circulating system [installed] to serve the gold extraction process with no discharge. However, “[w]hen it fails because of flaws in the construction or inadequate size to handle the fluids utilized, with resulting discharge, whether from a fissure in the dirt berm or overflow of a wall, escape of liquid from the confined system is from a point source.”); *see also, Ecological Rights Foundation v. Pacific Gas and Electric Company*, 2011 U.S. Dist. LEXIS 14140 (N.D. Cal. 2011) (“energy

company's work yards and service centers" ruled to be industrial facility in accordance with Standard Industrial Classifications listed in 40 C.F.R. § 122.26(b)(14)).

In considering the reasons underlying the government's determination to target industrial and municipal activity the Second Circuit in *Plaza Health* deferred to David Letson, a noted expert on the subject:

The emphasis [on industrial and municipal activities] was sensible, as "industrial and municipal sources were the worst and most obvious offenders of surface water quality. They were also the easiest to address because their loadings emerge from a discrete point such as the end of a pipe. David Letson, *Point/Nonpoint Source Pollution Reduction Trading: An Interpretive Survey* 32 Nat. Resources J. 219, 221 (1992)

Plaza Health, at 3 F.3d 646.

and

The legislative history of the CWA, while providing little insight into meaning of "point source", confirms the Act's focus on industrial polluters.

Id., at 647.

With this in mind, the Second Circuit in *Plaza Health* went on to explain, in the process of deciding that "[h]uman beings are not among the enumerated items that may be a point source.", that:

Although by its terms the definition of point source is nonexclusive, the words used to define the term and the examples given (pipe, ditch, channel, tunnel, conduit, well, discrete fissure, etc.) evoke the images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways." (internal quotation marks omitted) (underline in original).

In applying the foregoing legal interpretations to the facts and circumstances involving public fireworks displays it is abundantly clear that public fireworks displays are, invariably, a

form of expression, including artistic and political, as well as legitimate entertainment that hardly evokes images of physical structures and instrumentalities that systematically act to convey pollutants. Rather, public fireworks displays by their very nature are public, community-oriented and community-spirited activities, transcending race, culture, ethnicity and religion. Fireworks, simply stated, are designed to produce an audible or visible effect, or both. Since the very founding of the United States public fireworks displays have been used as part of public expressions of patriotism, and public fireworks displays are, in many respects, the intersection of political expression, art and entertainment.

In conclusion, to the extent that public fireworks displays do not constitute an industrial or municipal activity of the type envisioned by the CWA the Order should be rescinded as a matter of law.

3. Display Fireworks Do Not Discharge Into Waters

Petitioners argue that the Regional Board has also failed to sufficiently demonstrate that public fireworks displays meet the “into the water” element within the provisions of the CWA; and the failure to do so is another basis to rescind the Order as a matter of law. “The NPDES program requires permits for the discharge of ‘pollutants’ from any ‘point source’ *into* ‘waters of the United States.’” 40 C.F.R. §122.1(b)(1) (emphasis added). According to the Merriam Webster Dictionary, the word ‘into’ is commonly “used as a function word to indicate entry, introduction, insertion, superposition or inclusion.” Merriam-Webster Online Dictionary (2011); <http://www.merriam-webster.com/dictionary/into> (May 17, 2011). In other words, in order for the NPDES requirements to apply to a discharge of pollutants the point source must be the point at which the pollutant enters the water. However, as expressed in the Order, fireworks are “discharged into the air”, Order, at p. F-42, some “200 and 1000 feet above ground level”; Order,

at p. F-8, whereupon the contents are “scattered”, Order, at page 5, meaning that they explode into the atmosphere. *Id.* at pp. 5, 10, F-5 to F-10. The Regional Board’s express recognition that factors, such as “wind speed and direction . . . and other environmental factors”, Order, at p. 5 and F-10, influence what “pyrotechnic materials”, if any, launched in coastal or inland regions ultimately enter the water is additional proof that fireworks are not automatically discharged into the water in a manner or in the magnitude that satisfies the “into the water” element of the statute.

Petitioners contend that the Regional Board’s reference to wind speed, wind direction and “other environmental factors” is just another way of saying that atmospheric conditions influence what, if anything, ultimately enters into the water considering the fact that fireworks residue can just as easily be carried by the winds over land and never reach a water body; another essential factor is the distance from the water. Petitioners further contend that the Regional Board’s reference to factors such as wind speed and direction are similar to the factors also found in the EPA Guidance that expressly mentions atmospheric deposition in the course of characterizing non-point source activity.

In light of the Regional Board’s express acknowledgement that display fireworks are “discharged into the air” with the contents “scattered” at high altitudes, it is both proper and reasonable to find that the activity does not satisfy the “into the water” element of the statute and, consequently, public fireworks displays are not a proper subject of the CWA. Accordingly, the Order should be rescinded as a matter of law.

4. Fireworks Do Not Meet The Definitions For Pollutant

Petitioners start with the premise that the word “pollutant” is not unlimited and not intended to be all inclusive. See, *George v. Resiorf Bros., Inc.*, 696 F. Supp. 2d 333 2010 U.S.

District LEXIS 11710 (W.D.N.Y. 2010) (“[t]he EPA never advocated the unlimited definition of pollutant and Congress did not intend the term pollutant to be all inclusive nor should the Court expansively construe the term pollutant which Congress has specifically defined.”) (internal quote marks omitted). Petitioners go on to observe that the CWA defines “pollutant” as meaning “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharge into” water. 33 U.S.C. § 1362 (6). Nowhere within the definition are the words “fireworks” or “pyrotechnic materials” found, lending support that fireworks are not a pollutant within the provisions of the CWA.

Similarly, simple reference to the definition of “fireworks” in the Order confirms that fireworks do not constitute waste under it:

Fireworks

“Fireworks” means any device containing chemical elements and chemical compounds capable of burning independently of the oxygen of the atmosphere and producing audible, visual, mechanical, or thermal effects which are useful as pyrotechnic devices or for entertainment.

Order, at page A-4.

A plain reading of the Regional Board’s own definition of “fireworks” indicates nothing that would suggest or imply that fireworks should be considered a “waste”. Similarly, reference to the Regional Board’s own definition, by incorporation, of the term “waste” further supports the proposition that fireworks do not satisfy the definition of the term “waste”:

CWC section 13050(d) provides that “Waste” includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purpose of disposal.

Order, at page 8.

Here again, nothing in the stated definition of the term “waste” suggests that public fireworks displays are meant to fall within the purview of the CWC as referenced in the Order. For instance, public fireworks displays have, at best, an indirect and fleeting association with human habitation and, certainly, nothing about public fireworks displays constitutes a waste “of human or animal origin” within either the spirit or meaning of those terms. Significantly, the Regional Board has expressly stated that “[t]he Tentative Order does not identify fireworks displays as a source of wastewater.”, in addition to it also concluding no activity relating to a process of production or manufacturing occurs. See, Responses to Significant Comments, at ‘h’) and ‘i’) on page 35. In short, other than the Regional Board’s passing observation that fireworks are made of “pyrotechnic materials”, it does not go on to mention or describe any aspects of fireworks manufacturing, producing or processing; in fact, the Regional Board expressly denies any connection.

Petitioners also assert that fireworks are not situated within the mortar tube “prior to, or for purposes of disposal.” of a waste item; and nothing in the Order either refers or suggests that a public fireworks display involves a “disposal” within the purview of Cal. Water Code § 13050 (d). One reason for the omission may be attributed to the Regional Board’s appreciation that fireworks are a finished “device”, not a waste item, and that finished fireworks shells are made of “pyrotechnic materials”. In fact, nothing in the Order even remotely suggests that the disposal of a waste within the purview of the statute occurs during a public fireworks display.

In conclusion, the term “fireworks” does not fit comfortably within the definitions of “pollutant” or “waste”, as those terms apply in the Order. Once again, the Order has failed to sufficiently establish that public fireworks displays constitute a discharge of a pollutant from a

point source into the water within the purview of the statute and, accordingly, the Order must be rescinded.

5. The Quantity Is Immeasurable And Not A Discharge Of A Pollutant

Even were public fireworks displays to involve a discharge of pollutant waste from a point source, something Petitioners vehemently deny, one must also consider the fundamental fact that not every object, article or atom that reaches the navigable waters constitutes a pollutant discharge. Significantly, in *Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180 (2d Cir. 2010) the Second Circuit left undisturbed the District Court's ruling that "even if small amounts of pesticide did reach navigable waters," it may properly be found not to be a discharge of pollutants within the purview of the CWA. See, *Peconic Baykeeper, Inc. v. Suffolk County*, 585 F. Supp. 2d 377, 2008 U.S. Dist. LEXIS 93137, 68 Env't Rep. Cas. (BNA) 2072 (E.D.N.Y. 2008) (CV 04-4828 (U.S.D.C., E.D.N.Y.) (Spatt, J.) (any contact with water was incidental to the activity of spraying from, variously, helicopter and truck.). For similar reasons, public fireworks displays do not constitute a discharge of pollutant even if small amounts of fireworks residue were to reach water from inland or coastal public fireworks displays.

Here, the Regional Board openly admits that it is unable to quantify the amount of pollutants, if any, involved, and this omission is proper grounds to rescind the Order. See, Order, at page 11. Also fatal to the Order's continuance is the Regional Board's admission that the Order "does not precisely specify the point(s) at which fireworks residue becomes a pollutant waste," Order, at page 9, calling into question both the quantity and quality of the items that are the subject of the actions of the Regional Board.

Notwithstanding the Regional Board's admitted inability to quantify the material it desires to regulate, the Petitioners note that the Order expressly seeks to regulate "residual

fireworks pollutant waste”, necessarily implying that a small quantity is involved. The Regional Board’s failure to define core terms like “[r]esidual fireworks pollutant”, “fireworks residue”, “fireworks combustion residue” and “combustion residue”, is inexcusable, and provides the reader with the impression that the quantity involved is relatively small, insignificant and inconsequential. In fact, the Regional Board stresses that the quantity involved is “immeasurable and undefined.” due to a variety of intervening factors, such as atmospheric conditions and environmental factors, not to mention the various features specific to each firework. See, Order, at page 11. In light of the Regional Board’s admission that the levels of discharge are “immeasurable”, Order, at page 11, it has provided no assurance that the quantity of material involved are of any consequence and worthy of regulation. The Regional Board’s failure to define these core terms in the Order also exhibits a lack of clarity and definiteness, providing proper grounds to rescind the Order due to vagueness.

In conclusion, the Regional Board’s recognition that the quantity involved is immeasurable and undefined is tantamount to it also admitting that the amounts involved are *de minimis*, undetectable and not actionable. The State Water Board should not approve a first-in-the-nation permitting program that is not supported by science or the existing law. Accordingly, the Order must be rescinded as a matter of law.

6. The Regional Board Has Failed To Satisfy Its Burden Of Establishing Definable and Measurable Pollutant Levels and Its Duty To Furnish Fair And Adequate Public Notice

Any effort by the State Water Board to excuse the admitted failure of the Regional Board to specify the point(s) at which fireworks constitute a discharge of a pollutant within the CWA is hopelessly frustrated by the Regional Board’s finding that “[t]his Order does not contain technology based effluent limitations. [since] [t]here are currently no applicable Effluent

Limitation Guidelines (technology based requirements established by the USEPA) for discharges associated with public displays of fireworks.” This shortcoming is likely rooted in the unavoidable fact that “[t]his General Permit [seeks to] regulate[] discharges of residual pollutant waste . . . that are present *after the use* of the fireworks for public display.”, Order, at page 11 (emphasis added), an activity Petitioners argue falls outside the purview of the CWA. While the ordinary reader appreciates the plain meaning of the phrase ‘after the use’, the Regional Board does not explain in any detail its first-in-the-nation determination that ‘after the use’ constituents relating to fireworks are a proper subject of regulation under the CWA. This shortcoming is further compounded by another express admission by the Regional Board that the quantity involved is not susceptible to measurement or, in its own words, “immeasurable”. See, Order, at pages 11 and F-31.

The Petitioners cannot overemphasize that the Regional Board is charting new territory by seeking to exercise its authority over ‘after the use’ discharges of a pollutant without the benefit of any legislative or administrative guidance. It remains an undisputed fact that fireworks qualify as a finished product *prior to use*, and fireworks are both designed and intended to be launched into the atmosphere (whether from an inland or coastal location) whereupon the contents are “scattered” in the process of producing “an audible, visible, mechanical or thermal effect,” See, Order at p. A-4. The additional fact that aerial fireworks shells are intended to incinerate means that, by design, fireworks leave little, if any, residue, and this fact makes it impossible to reconcile with the Regional Board’s actions to regulate fireworks “after the use”, especially where, like here, there is no substantiation or quantification of the amount(s) of material actually involved. In light of the novelty of regulating any activity ‘after

the use', Petitioners contend that the Regional Board has exceeded its regulatory authority and mandate and, as a result, the State Water Board should rescind the Order in its entirety.

The Regional Board has also determined, without any further explanation, that "effective treatment" of the issue is not practicable due to its characterization of the issue as "short duration intermittent residual fireworks pollutant releases to surface waters at many different locations", Order, at p. 11, various characteristics that, ironically, place public fireworks displays outside the commonly accepted definition of "point source", not within it. To summarize, the Regional Board admits that it presently cannot accurately describe the activity that, in its eyes, is in need of regulation and, additionally, it is unable to recommend an effective solution ("treatment") to the alleged problem. Notwithstanding these shortcomings, the Regional Board appreciates the fact that public fireworks displays are of "short duration" and occur "at many different locations.", *Id.*, and Petitioners assert that these factors place public fireworks displays comfortably outside the commonly-accepted definition of 'point source'. Indeed, the 'infrequency' element characterizing fireworks displays as described by the Regional Board is inconsistent with the widely-accepted opinion that point-source discharges invariably involve the element of continuity, permanency and a discernible location.

In conclusion, the plain language of the CWA, its legislative history and subsequent judicial interpretations, as well as the Regional Board's own findings (and exclusions), all lead to the determination that public fireworks displays do not constitute, as a matter of law, a "point source" discharge of pollutants and, consequently, are not a proper subject to a sweeping NPDES permitting program. Accordingly, the Order should be immediately rescinded.

For purposes of completeness, Petitioners also register their objections to the fact that the Order does not contain a definition for Discharger in the 'Definitions' section ('Attachment A')

portion of the Order but, rather, it is cross-referenced (vaguely) as part of the Fact Sheet; also, the term “defective firework” used in connection with the post-display report is not defined in the Order in any manner. See, Order at pages F-38 and C-2, respectively.

7. Other Statutory Considerations

a. The Regional Board Impermissibly Failed To Consider All Factors Expressed In Water Code Sections 13000 and 13267, Without Justification

When regulating activities that may affect water quality the Regional Board is constrained by law to “consider[] all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible” (Water Code § 13000). Although the Regional Board mentions it “developed the requirements of this Order based on available monitoring data and other available information related to the effects, characteristics and regulation of firework pollutant discharge”, Order, at p. 10, regrettably there are no similar assurances that it has also considered relevant economic, social, tangible or intangible factors in accordance with the express edicts of the California Water Code. The failure of the Regional Board to evaluate these salient factors provides a proper basis to rescind the Order.

In the process of establishing waste discharge requirements for political, civic and entertainment activities involving fireworks, the Regional Board also exercised its discretion by instituting formal obligations relating to water quality; indeed, the Order contains an entire section entitled **MONITORING AND REPORTING PROGRAM**, see, Order, at pages E-2 to E-13. However, there is nothing within the Order to indicate that the Regional Board had even engaged in the prescribed cost-benefit analysis before ultimately deciding to require the submission of detailed post-display reports by all enrollees, without discrimination and irrespective of the

burdens that certain persons may suffer as a result. By virtue of the omission, the Regional Board's actions are without excuse and unjustified.

Notwithstanding the shortcomings arising from the Regional Board's failure to perform a cost-benefit analysis on its own accord, the accompanying declaration of Joseph Bartolotta sufficiently establishes that the additional costs for reporting, alone, will add approximately \$750 to \$1,000 to each and every public fireworks display; this is in addition to the \$1,452 enrollment fee which is non-discretionary. See, Declaration of Joseph Bartolotta, dated May 27, 2011, at ¶ 5. Unlike SeaWorld, other affected persons, typically a non-profit or charitable organization, are unable to spread the financial and administrative burdens these costs and obligations create without enduring undue hardship.

It is evident from reading the Order that the Regional Board has completely failed to consider all of the burdens and costs associated with complying with the terms and obligations of the Order, including the direct and indirect costs associated with generating and filing formal post-display reports, notwithstanding its explicit obligation to ensure "[t]he burden, including costs, of the reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports" Cal. Water Code § 13267.

Due to the foregoing facts and circumstances, the State Water Board should err on the side of rescinding the actions of the Regional Board, not only due to the analytical short-cuts taken by the Regional Board, but also because it is an issue fraught with state-wide and national implications that mandates due deliberation. The State Water Board is charged with the responsibility to exercise its powers to rescind the actions of the Regional Board not only where actual impropriety has occurred, but also in those instances where it is necessary to avoid the mere appearance of impropriety. Petitioners suggest that the actions of the Regional Board have

the appearance of impropriety and, more likely than not, are improper. In conclusion, it is evident from the foregoing that the Regional Board failed to properly discharge its duty to consider all environmental, economic and social factors involved, and also avoided balancing the various competing costs and benefits, and each of these shortcomings presents proper grounds to also rescind the Order as a matter of law.

III. THE CASES CITED BY THE REGIONAL BOARD ARE DISTINGUISHABLE

Not surprisingly, the Order cites to no EPA determination or guidance and also fails to furnish any case law authority on the subject, as none exists. The staff attorney's memorandum admits as much, although it purports to extrapolate distinguishable cases to public fireworks displays. Notwithstanding, a balanced review of the case law establishes that the developing consensus weighs in favor of a finding that public fireworks displays do not constitute a discharge of a pollutant from a point source into the water.

Two of the cases cited by the Regional Board, through the Chief Counsel Letter, in support of its sweeping regulation are (1) *Romero-Barcelo v. Brown*, (1st Cir., 1981) rev'd sub nom., *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), involving millions of pounds of ordnance dropped by military aircraft during bombing practice runs in Puerto Rico; and (2) *Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180 (2d Cir. 2010), involving the spraying of pesticides over water to control mosquito breeding and the spread of virus. Notwithstanding that the particular activity involved in each of these two decisions was found to constitute a discharge of a pollutant from a point source into the water within the purview of the CWA, the Regional Board seemingly attaches greater importance to them since, upon closer inspection, each one is factually distinguishable from the Regional Board's novel consideration of regulating public fireworks displays, making reliance upon either citation a risky proposition. A survey of the

decisions that have addressed the question of what constitutes a 'point source' within the purview of the CWA demonstrates that each decision is fact specific and, thus, determined on a case-by-case basis.

In *Weinberger*, the US Supreme Court determined that military target practice by the Navy occurring on and about the Puerto Rican island of Vieques unavoidably, sometimes deliberately, caused ordnance to fall into the water. The facts describe a "bone yard" of shells and metal measuring millions of pounds. In view of the fact that the term 'munitions' is expressly designated as a pollutant under the CWA; see, 33 U.S.C. § 1362 (6), it was relatively straightforward to find that the activity falls comfortably within the statute's purview. Indeed, the US Navy could not avoid or hide the fact that ordnance are also commonly referred to as 'munitions', a term expressly found within the CWA; therefore, the military sought to defend the practice on the grounds of national security efforts that should not be burdened with regulation. That argument failed to deter the Supreme Court from finding the ordnance in *Weinberger* fell within the term 'munitions' as explicitly defined in the statute. The US Supreme Court in *Weinberger* also found that large amounts of ordnance were deliberately dropped onto targets located in the water, satisfying the "into the water" element of the statute. By reason of the fact that the activity in *Weinberger* fits neatly with the explicit definitions contained in the relevant statutes, the US Supreme Court went on to determine that "the release of ordnance from aircraft or from ships into navigable waters is a discharge of pollutants" from a point source into the water.

Public fireworks displays, and fireworks, are markedly distinguishable from items such as military ordnance, or munitions. Fireworks, for example, are designed to create an audible or visible effect, or both, whereas munitions and ordnance are instruments of destruction. Also, the

act of releasing millions of pounds of munitions onto and surrounding the island of Vieques stands in stark contrast to a public fireworks display, whether situated inland or at coastal areas. Further, public fireworks displays are by their very nature public; there is nothing public about military ordnance or munitions or military target practice. Similarly, whereas public fireworks displays are a legitimate example of art intersecting with public entertainment and freedom of expression, the military's deployment of tons of military ordnance for target practice is something markedly different. The foregoing facts and arguments demonstrate that public fireworks displays do not constitute a discharge of a pollutant waste from a point source into water within the scope of the CWA.

Another case cited by the Regional Board, again via the Chief Counsel Letter, is *Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180 (2d Cir. 2010). In that action, the Second Circuit relied upon a Ninth Circuit decision that aircraft equipped with tanks spraying pesticides from mechanical sprayers directly over covered waters constituted a discharge of a pollutant from a point source, citing *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1185 (9th Cir. 2002). The Second Circuit applied this reasoning in the course of determining that the spraying of pesticides (to control mosquito breeding) from helicopters and trucks over water also constitutes a discharge of a pollutant from a point source. *Peconic Baykeeper*, 600 F.3d at 188. The connection between the aircraft equipped with spraying apparatus in *League of Wilderness Defenders* and the helicopters equipped with spraying apparatus in *Peconic Baykeeper* is relatively straightforward. To the extent that the trucks in *Peconic Baykeeper* were also spraying pesticides directly into the water the conduct satisfied the "into the water" element of the statute. More significantly, the Second Circuit left undisturbed the District Court's finding that statutes and cases conclude that "even if small amounts of pesticide did reach navigable waters, that does

not constitute a discharge of pollutants under the provisions of the Clean Water Act.”. *Peconic Baykeeper, Inc. v. Suffolk County*, 585 F. Supp. 2d 377, 2008 U.S. Dist. LEXIS 93137, 68 Env't Rep. Cas. (BNA) 2072 (E.D.N.Y. 2008) (CV 04-4828 (U.S.D.C., E.D.N.Y.) (Spatt, J.).

Petitioners argue that judicial findings of this nature indicate that courts are sensitive to the unavoidable fact that there will be instances where indirect or incidental contact would occur, but the activity or the quantity involved is too insignificant to be deemed a discharge of a pollutant within the purview of the statute. Based upon the foregoing, Petitioners contend that the Regional Board has the burden of establishing the amount of discharge to be subjected to regulation and cannot, like here, rely solely upon speculation and conjecture that is predicated upon one study (SeaWorld) that, admittedly, contains inconclusive data from a very small body of water with unique characteristics that are not in any respect representative of the waters throughout the region. Here, Petitioners contend that any quantity subject to regulation is so insignificant and inconsequential that public fireworks displays are not subject to the provisions of the CWA.

The Regional Board's citation to a decision from the State of Illinois, *Stone v. Naperville Park District et al.*, 38 F.Supp.2d 651 (N.D. Ill., 1999), is curious at best. The Chief Counsel Letter cites *Stone* in the course of arguing that “[t]he firework itself is the pollutant, much like the bullet is the pollutant at a firing range.” However, the court in *Stone* never discussed the issue of whether or not a bullet constitutes a pollutant since, in that action, it was an undisputed fact and, as a result, the court never addressed this issue. Rather, the court in *Stone* addressed primarily the question of whether or not the specific trap shooting range, which was situated near navigable waters, qualified as a point source within the purview of the CWA. In determining that a point source was present, the court observed that “no other activity occurs.”, *Id.* at 655. By

contrast, the coastal areas subject to regulation under the Order are used for countless other beneficial purposes other than public fireworks displays, such as for bathing, boating, hiking, fitness, and sightseeing. Also, to the extent that a public fireworks display takes advantage of natural field conditions and, as the Regional Board concedes, only for a temporary period of time, it is distinguishable from the trap shooting range in *Stone* that was described by the court as a permanent facility with fixed structures, the entirety of which is both designed and intended to concentrate shooting activity (“no other activity occurs”). Id. In summary, in *Stone* the elements of munitions and channeling were present, permitting the court to summarily qualify the trap shooting range as a point source within the express terms of the CWA.

Not only is *Stone* distinguishable on the facts and, therefore, of limited value, the citation to it in the Chief Counsel Letter is also at odds with the Regional Board’s even more recent pronouncement, in response to an NFA question, that the Order “does not contain any language that concludes fireworks are demonstrably equivalent to munitions or ammunitions.” See, Responses to Significant Comments, at page 36; *see also*, Section, 4, herein. On the one hand, the Regional Board explicitly announces no connection between fireworks and ammunition while, on the other hand, the Office of Chief Counsel relies upon cases involving permanent commercial trap shooting ranges, and bullets. This glaring inconsistency regarding such a critical issue spotlights the ambiguity surrounding the actions of the Regional Board and gives credence to the argument that it is acting in an arbitrary and capricious manner, requiring that the Order be rescinded.

Also, not all situations involving firing ranges automatically constitute a point source subject to regulation under the CWA, despite the Regional Board’s suggestion to the contrary (as contained in the Chief Counsel Letter at page 2). The distinction is addressed in *Cordiano v.*

Metacon Gun Club, Inc., (2d Cir. 2009) 575 F. 3d 199, wherein the Second Circuit found “no evidence that lead has leached from the berm into ground water” due to the activities of the rifle range, and “even assuming that the Metacon berm may be described as a container, or conduit, the record contains no evidence that it serves as a confined and discrete conveyance of lead to jurisdictional wetlands by these routes.” (internal quotation marks removed). *Cordiano v. Metacon Gun Club* establishes that the discharge of lead does not automatically constitute a discharge of a pollutant from a point source into the water within the purview of the CWA. By virtue of the fact that the Second Circuit in *Cordiano v. Metacon Gun Club* resolved the matter on these grounds it did not go on to address the issue of what constitutes a point source, severely limiting the value of the decision on this subject: “SAPS also argues that the firing line from which Metacon members shoot constitutes a point source. We need not reach the issue, however.” 575 F. 3d 199, at 224. The fact that the Second Circuit reserved decision on the point source issue makes the Regional Board’s citation to it in this matter, in support of asserting that “courts have broadly interpreted the definition of a point source.”, somewhat misleading and completely unjustified. If anything, *Cordiano v. Metacon Gun Club* firmly establishes that situations exist whereby the activities of a firing range is not within the purview of the CWA, undermining the Regional Board’s suggestion that public fireworks displays are similar to firing ranges.

The Petitioners assert that one of the hallmarks of a sound and proper regulation is continuity and consistency, neither of which is present from the conflicting pronouncements of the Regional Board and its Office of Chief Counsel. Under the circumstances, the State Water Board must err on the side of rescinding the actions of the Regional Board, if only to avoid the appearance of impropriety. In light of the fact that no stated urgency has been identified by the

Regional Board, nor has it asserted any imminent threat to health or safety, any delay in the enacting the Order will not cause it to suffer undue prejudice, nor would it cause the general public to suffer harm. For the foregoing reasons the Order must be rescinded.

In conclusion, for the foregoing reasons, the cases cited by the Regional Board in support of its actions are factually distinguishable from public fireworks display and, ironically, in some measure are actually helpful in substantiating Petitioners' assertions that (1) public fireworks displays do not involve a discharge of a pollutant from a point source into the water within the meaning of the CWA and, even if true, (2) the minuscule amounts of residue that may be involved—the Regional Board contends that it is “immeasurable and undefined”—does not automatically qualify it as a discharge of pollutants under the provisions of the CWA.

IV. THE REGIONAL BOARD'S ACTION MEETS THE STANDARD OF ARBITRARY AND CAPRICIOUS OR LACKING IN EVIDENTIARY SUPPORT

Pursuant to the California Code of Civil Procedure, the standard of review of quasi-legislative actions is limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking in evidentiary support. See, *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1148, 2010 U.S. App. LEXIS 26112 (9th Cir. 2010). The Ninth Circuit went on to elaborate that the inquiry will investigate whether or not the decision(s) subject to review is “founded on a rational conclusion between the facts and the choices made.” *Greater Yellowstone Coalition*, at 1148, citing, *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 272 F.3d 1129, 1243 (9th Cir. 2001). Furthermore, Water Code section 13000 imposes the duty to act in a reasonable manner upon the Regional Board. The Regional Board, like other administrative bodies in California, also have the duty to “set forth findings to bridge the analytical gap between the raw evidence and ultimate decision or order.” *Topanga Assn. for a Scenic Community v.*

County of Los Angeles, 11 Cal.3d 506, 515 (Cal.1974). As part of this duty the administrative agency, in this case the Regional Board, must clearly disclose the grounds upon which it acted and the action taken must be adequately sustained by the evidence. *Id.*, at 516, citing *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 94 (1943). This duty demands that the Regional Board “draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions.” *Id.*, at 516. Here, the Regional Board has failed to provide any explanation that assists to bridge the gap between the information that the Regional Board has considered and the actions it has taken as a result, calling into question the adequacy and legitimacy of the Order.

For example, the Regional Board’s description of the discharge location and discharge points leaves much to be desired in terms of clarity and definiteness. The words “[v]arious locations through San Diego Region” referred by the Regional Board on the Order’s cover page is too vague and imprecise to constitute sufficient notice regarding how close a public fireworks display must be to a subject water body for it to be within the purview of the Order. The Order leaves open to debate whether a particular fireworks display site is far enough from the water to avoid enrollment, and provides no guidance on this fundamental issue. Consequently, all persons, such as Fireworks America, are currently left to rely upon their subjective criteria in the process of making a good faith determination whether or not the Order applies to a particular public fireworks display. The Order, in present form, exalts art over science, exposing persons such as Fireworks America to arbitrary and uneven enforcement of the Order. All of this guesswork and uncertainty could be easily rectified with fixed distances or measurements that are both scientifically sound and reliable.

The Regional Board seemingly excuses the lack of providing a fixed measurement in the Order due to the Regional Board's express recognition that the "fallout area depends upon the wind and the angle of the mortar." Order, at page A-4. The Regional Board express acknowledgement that atmospheric conditions have a direct influence on a public fireworks display only serves to bolsters Petitioners' contention that the process of determining whether or not a public fireworks display needs to apply under that the General Permit is more art than science. The observations of the Regional Board restates what is common knowledge, but merit amplification: public fireworks display are subject to the whims of the wind and other relevant atmospheric conditions (e.g., humidity, altitude) that will influence the performance of fireworks. Personal observation of a public fireworks display will confirm the fact that calm winds may cause the fireworks to be obscured by the smoke that is created, whereas a light wind may cause the smoke to drift away from the fireworks improving visibility, whereas very strong winds or gusts will likely cause its postponement.

Petitioners assert that the Order is impermissibly vague to the extent that it does not contain any distances or objective measures to allows persons to determine with a relative degree of certainty whether or not a particular public fireworks display needs to comply with the Order. Petitioners, and all other persons similarly situated, should not have to rely upon subjective factors of their own creation in an effort to comply with the Order in good faith, at the risk that the criteria used may later be challenged as a violation of the Order.

In conclusion, the Order creates substantial and undue hardship to the extent that it exposes all persons to an after-the-fact determination that a specific public fireworks display did not fall outside the scope of the Order. The Order fails to answer the very important question of

How far is far enough (from the water)? For the foregoing reasons, a stay should be immediately issued.

Petitioners also register their objections regarding the Regional Board's unwarranted reliance upon incomplete and inconclusive science. It is relevant to highlight that, apart from its reliance upon the raw data and limited findings provided to it by SeaWorld, the Regional Board cites no other source of reference, independent or otherwise, in support of its findings. When one considers the fact that SeaWorld had negotiated for 150 annual fireworks displays, or a total of 750 displays for the 5-year permit period encompassed by its individual permit (that the Regional Board issued to SeaWorld in 2005 and, according to its terms, expired in 2010), reliance solely upon the data relating to only its three largest fireworks displays appears, on its face, to be both statistically unreliable and scientifically unsound.

Also, the Order in its present form operates in a manner that creates numerous inequities. For instance, to the extent the Order applies the same permit fee whether a person conducts one public fireworks display annually or, in the case of SeaWorld, up to 150 daily fireworks displays annually, the Order creates an unjustified inequity and undue hardship (upon the first group of persons). Petitioners contends that persons that modest public fireworks displays occurring only once per year, such as on the Fourth of July or New Year's Eve, will suffer substantial harm and hardship, directly due to the additional costs and obligations of the Order. Similarly, an incongruity arises by the Order's specific identification of only two chemicals of interest, copper and perchlorate, see, Responses to Significant Comments, at page 31, Comment Response 55. ("[c]onstituents of concern include, but not limited to, copper and perchlorate."), to the extent that neither Mission Bay nor San Diego Bay is a source of drinking water and, therefore, water quality monitoring obligations for perchlorate in either water body is, arguably, unwarranted, not

to mention an unjustified waste of money. In fact, the Regional Board acknowledges that “water chemistry sampling of regular SeaWorld” events...to date showed little evidence of pollutants within the receiving column at levels above applicable water quality criteria or detected reference site levels.” Order, at pages F-12 to F-13.

Having reasoned that perchlorate should not be a constituent of concern to the Regional Board, copper is the only constituent of express interest remaining. While, admittedly, copper compounds are used to produce blue colors in pyrotechnic compositions, only a small portion of fireworks are designed to produce the color blue in whole or in part; it is entirely a matter of artistic taste whether or not use fireworks containing copper and in what proportion. In this regard, the Order fails to take into account instances where copper may be partially or completely absent from a particular public fireworks display, negating any purported need for monitoring for that substance or, more importantly, regulation under the General Permit. Petitioners find it both fair and reasonable to highlight the fact that the Regional Board neglects to describe what obligation, if any, a person has when a particular fireworks display utilizes fireworks that do not contain any copper. The Order produces an unjustified inequity to the extent that a public fireworks display containing absolutely no copper is subject to the same NPDES general permit enrollment process, and obligations, required of a similar display involving fireworks that contain substantial amounts of copper. The failure of the Order to (i) address instances where no copper is to be used, in general, or (ii) account for the quantity of copper actually used in connection with calculating net explosive weight, more specifically, are both apt illustrations that certain provisions in the Order create inequities that are inconsistent with the mandate of the Regional Board.

It is not entirely clear why the Regional Board expressly specifies copper as a constituent of interest, and reference to the Order and other various pronouncements of the Regional Board fails to shed any light on the issue, leaving Petitioners to assume that copper is, in actuality, a relatively minor issue in the view of the Regional Board. It is more widely known that copper is an active ingredient of antifouling paints that are applied to vessels, such as the barges that navigate the waterways and, incidentally, are commonly used as a platform for fireworks displays. Most importantly, it seems that the data reviewed by the Regional Board is entirely inconclusive, and there is nothing before the Regional Board or in this record that can trace copper to public fireworks displays as opposed to the barges that ply navigable waters or any of the countless other sources of copper in the region. To summarize, while copper may be amongst the “constituents of concern” there has been no empirical proof offered by the Regional Board to suggest or establish that public fireworks displays, to the exclusion of other potential causes, is the true culprit and requires regulation. In this regard, the Regional Board’s actions are entirely based upon conjecture and speculation, as opposed to being rooted in scientific or engineering research that concludes that copper substances in fireworks can be traced to a degradation of the quality of water, including drinking water.

A similar inequity arises in connection with ‘green’ fireworks, referred to by the Regional Board in the Order as ‘alternative fireworks’. Generally speaking, all ordinary fireworks contain some chemical materials, whereas green fireworks are manufactured, in whole or in part, with chemicals and materials that are not considered pollutants. Notwithstanding the industry’s work to make fireworks work better, the Order does not contemplate how the use of green fireworks at a public fireworks display would influence the loading of speculative pollutants to U.S. waters. The failure to factor in green fireworks as part of a formula for calculating net explosive weight

creates an inequity to the extent that it unfairly penalizes persons that are eager to employ green fireworks. Surely, the Regional Board's mandate is advanced whenever green fireworks are used or, similarly, whenever cooper is reduced or eliminated. However, the Order in its present form acts as a disincentive to pursue environmentally sound alternatives due to the fact that the additional expense of using green fireworks is not offset or outweighed by the savings realized by avoiding enrollment under the General Permit. Without justification, a fireworks display composed entirely with green fireworks would be subject to the same NPDES general permit enrollment process, and obligations, required of a similar display consisting entirely of non-green fireworks. The failure of the Order to (i) address instances where only alternative fireworks are used, in general, or (ii) account for the quantity of alternative fireworks actually used in connection with calculating net explosive weight, more specifically, are both apt illustrations that various provisions in the Order create inequities that are inconsistent with the mandate of the Regional Board.

To the extent that it has classified all fireworks activity as, at most, a low-risk Category 3C threat to water quality, the Regional Board's actions appear overzealous. Category 3C is defined as "those discharges of waste that could degrade water quality without violating water quality objectives, or could cause minor impairment of the designated beneficial uses." See, Title 23 Cal. Code Regs. § 2200. Interestingly, the Regional Board both acknowledges that, after considering the totality of the circumstances public fireworks displays are not likely to cause any degradation in water quality, and also concedes that it is unable to quantify the amount of discharge of fireworks, if any, that is required to degrade water quality. Under these circumstances, it is apparent that any impairment to water quality objectives is minor.

In conclusion, the foregoing facts and circumstances sufficiently establish that the Regional Board has not satisfied its burden to fully and accurately explain how its actions will have a beneficial effect to water quality that is demonstrable and in balance with the costs to be associated with full compliance. The foregoing facts and arguments also establish that the Regional Board has acted in a manner that meets the definition of arbitrary and capricious conduct and against the weight substantial evidence. Accordingly, the Order must be rescinded.

5. THE MANNER IN WHICH PETITIONERS ARE AGGRIEVED:

As more fully discussed below, and in the supporting declaration accompanying this Petition, the NFA and Fireworks America will suffer irreparable economic harm should either organization or its clients be forced to become an enrollee under the General NPDES Permit and be required to implement the obligations contained in the Order. The new fees and obligations in the Order will result in a substantial increase in costs associated with public fireworks displays; a fair estimate is an additional expense of up to 10% to 20% over current expenses. The additional expense will, in turn, prompt the cancellation of certain public fireworks displays, causing economic injury to Fireworks America and other residents of San Diego and Orange County that earn a livelihood from participating in public fireworks displays throughout the Regional Board's jurisdiction.

The threat of injury, both economic and irreparable, to Fireworks America, and others, is both real and imminent; each public fireworks display that is canceled by reason of the Order deprives persons like Fireworks America of revenues and, in turn, the technicians that its employs are deprived of a livelihood. Regrettably, there is no assurance that, once canceled, the public fireworks display will not be eliminated altogether, causing Fireworks America to suffer

irreparable injury. Additionally, the loss of professional administered fireworks displays leads to an increase in unlicensed fireworks displays, leading to an increase and fire risk.

The State Water Board should take notice of the various articles recently published on the subject of California public officials, among others, canceling public firework displays to avoid the costs of the Order. These facts establish that Fireworks America and others similarly situated—such as local members of the NFA that earn a living in the region—stand to suffer both economic and irreparable injury were the Order to be implemented on June 1, 2011. The San Diego Fire Chief has declared that the loss of public fireworks displays conducted by professionals will lead to an increase of unlicensed fireworks displays, and Petitioners do not dispute this.

Briefly stated, the NFA is an association made up of approximately 500 members representing every aspect of the fireworks industry, including fireworks displays in and about Mission Bay, San Diego and Orange Counties and throughout the State of California. While not a requirement of membership, the majority of NFA members are licensed professionals that regularly transact business in and about San Diego County or rely upon business in San Diego County for all or part of their livelihood. Amongst the purposes of the NFA is to provide a forum to its membership for the exchange and dissemination of knowledge; to provide the positive promotion, in a fair and equitable manner, of the concerns and interests of the fireworks industry and NFA members; to represent and advocate for and on behalf of its members before any and all courts and governmental bodies in relation to legislation, proposals and all forms of actions that effect the fireworks industry and its members. For the reasons described above, member of the NFA stand to suffer both substantial economic injury as well as irreparable injury in the event the Order is implemented.

The imminent threat of injury to Fireworks America, and others, is most acute given the fact that various 2011 Fourth of July public fireworks displays that have been planned to occur are imperiled by reason of the Order, due to the costs involved as well as due to the limited amount of time to fully review and digest all of the provisions of the Order *and* also file a NPDES "Notice of Intent" within the specified deadlines. Regrettably, many persons are unprepared to complete the requisite Notice of Intent, presuming that they are even aware of its existence. It seems inherently unfair to have the Order implemented under such awkward and hasty circumstances in one of nine regions in this state, and at the eleventh-hour, especially where no urgency or imminent threat to person or property is present.

6. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD THE PETITIONERS' REQUEST:

Petitioners respectfully request that the State Board:

- (a) Hold a full evidentiary hearing on the legal and substantive issues raised in this petition;
- (b) Issue an immediate stay enjoining the implementation of Resolution R9-2011-0022 (NPDES No. CAG999002); and
- (c) Rescind Resolution R9-2011-0022 (NPDES No. CAG999002) as the political, civic and entertainment activity sought to be regulated does not involve a discharge of a pollutant from a point source into water.

7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION, INCLUDING CITATIONS TO DOCUMENTS OR THE TRANSCRIPT OF THE REGIONAL BOARD:

Minutes and transcripts for the Regional Board's May 11, 2011 hearing are not yet available. The points and authorities discussed in this Petition are intended to be preliminary and will be supplemented by an additional memorandum to follow.

8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE APPROPRIATE REGIONAL BOARD AND TO THE DISCHARGER IF NOT THE PETITIONERS:

In accordance with title 23, section 2050(a) (8) of the California Code of Regulations, the Petitioners mailed a true and correct copy of this Petition by first class mail on May 31, 2011, to the Regional Board at the following address:

David W. Gibson, Executive Officer
California Regional Water Quality Board
San Diego Region
9174 Sky Park Court
San Diego, CA 92123

At this time, as this is a general permit, there is not an identified discharger. Therefore, the NFA has not mailed a separate copy of the Petition to a discharger.

9. A STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD, OR AN EXPLANATION OF WHY THE PETITIONERS WAS NOT REQUIRED OR WAS UNABLE TO RAISE THESE SUBSTANTIVE ISSUES OR OBJECTIONS BEFORE THE REGIONAL BOARD:

All issues raised herein were presented both orally or in writing to the Regional Board prior to that Board approving Resolution R9-2011-0022 (NPDES No. CAG999002).

Consequently, all issues addressed in this Petition have been properly preserved for presentation to this State Water Board.

10. REQUEST FOR EVIDENTIARY HEARING:

Pursuant to California Water Code, Section 13320(b) and Title 23, California Code of Regulations, Section 2052(c), Petitioners respectfully request the State Water Board hold an evidentiary hearing to allow evidence not contained in the record, but which may be relevant to the State Water Board's consideration of the Petition, to be developed and considered, and so that Petitioners may receive the due process to which is entitled to.

11. REQUEST FOR A STAY:

Petitioners request that the State Water Board issue a stay of implementation of Resolution No. R9-2011-0022 (NPDES No. CAG999002). The grounds for the stay are set forth below and in the attached declaration of May 27, 2011, of Joseph Bartolotta, president of petitioner NFA, as well as president of petitioner, FSA (the "Bartolotta Declaration"). Due to the imminent deadlines set forth in Resolution No. R9-2011-0022, Petitioners request that the State Water Board conduct a hearing on this matter as soon as possible. Pursuant to § 2053 of the State Water Board's regulations (23 Cal. Code Regs. § 2035), a stay of implementation of an order shall be granted if a petitioner demonstrates:

- (1) substantial harm to petitioner or to the public interest if a stay is not granted;
- (2) a lack of substantial harm to other interested parties and to the public if a stay is granted; and
- (3) the existence of substantial questions of fact or law regarding the disputed action exist.

The requirements of a stay are met in this case, and Petitioners respectfully refer to the Bartolotta Declaration.

Dated: May 31, 2011

The Creadore Law Firm, P.C.

By _____/s/_____
Donald E. Creadore
Attorneys for Petitioners.