

State Water Resources Control Board



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TO: San Diego Water Board Members
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FROM: Jessica M. Newman
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Catherine George Hagan for Jessica Newman
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DATE: April 20, 2011

SUBJECT: Memorandum Analyzing Whether Fireworks Are Point Source Discharges under Clean Water Act

Background

The Regional Water Quality Control Board, San Diego Region (San Diego Water Board) is considering adoption of a national pollutant discharge elimination system (NPDES) permit for residual firework pollutant waste discharges to waters of the United States. The permit would cover public displays of fireworks in the San Diego region and uses a tiered approach to regulating the firework displays. Several comment letters received by the San Diego Water Board expressed the view that fireworks are not a point source discharge that could be regulated through an NPDES permit.

Question Presented

Are fireworks that enter waters of the United States a point source discharge?

Brief Answer

Yes, fireworks are a point source. The definition of a point source must be read broadly to protect water quality. While courts have not considered the issue of whether fireworks are a point source, courts have found that ordnance from military aircraft, spent shot from a gun fired over water, and pesticides sprayed via airplane or helicopter over water are all point sources. For fireworks, the point source is the instrument that shoots the firework into the air and causes the discharge.

Discussion

The Clean Water Act (CWA) prohibits the discharge of any pollutant by any person except when compliant the requirements in an NPDES permit. (33 U.S.C. §§ 1311(a); 1342.) The definition of “discharge of a pollutant” means “(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.” (33 U.S.C. § 1362 (12).) To explain that definition, the CWA also defines a “pollutant” and a “point source.” A pollutant is defined as “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 waste.” (33 U.S.C. § 1362(6).) The CWA defines a point source 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).)

The goals of the CWA must drive any analysis of the terms of the statute. The CWA was designed to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” (33 U.S.C. § 1251(a); see also *U.S. v. Lambert* (S.D.W. Va. 1996) 915 F.Supp. 797, 801.) Therefore, the “guiding star is the intent of Congress to improve and preserve the quality of the Nation’s waters.” (*American Petroleum Institute v. E.P.A.* (10th Cir. 1976) 540 F.2d 1023, 1028; see also *Kennecott Copper Corp. v. E.P.A.* (10th Cir. 1979) 612 F.2d 1232, 1236.) All further analysis must be viewed with this in mind.

In light of the goals of the CWA, courts have very broadly interpreted the definition of a point source. The Second Circuit Court of Appeals stated that the definition “embrac[es] the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States.” (*Peconic Baykeeper, Inc. v. Suffolk County* (2d Cir. 2010) 600 F.3d 180, 188 (quoting *Cordiano v. Metacon Gun Club, Inc.* (2d Cir. 2009) 575 F.3d 199, 219; *Dague v. City of Burlington* (2d Cir. 1991) 935 F.2d 1343, 1354-55); see also *Northwest Environmental Defense Center v. Brown* (9th Cir. 2010) 617 F.3d 1176, 1183; *United States v. Earth Sciences, Inc.* (10th Cir. 1979) 599 F.2d 368, 373.) One comment letter noted that the federal regulations interpreting the definition of a point source have focused on industrial sources. (Letter from Latham & Watkins on behalf of the La Jolla Community Fireworks Foundation (December 9, 2010) at p. 5.) While industrial sources may be common discharges, the definition of a point source is much broader than just that category of discharges. The Ninth Circuit Court of Appeals noted that Senate Committee Report “instructed that the [EPA] Administrator should not ignore discharges resulting from point sources other than pipelines or similar conduits...There are many other forms of periodic, though frequent, discharges of pollutants into the water through point sources such as barges, vessels, feedlots, trucks, and other conveyances.” (*Northwest Environmental Defense Center v. Brown, supra*,

617 F.3d at p. 1183 (quoting Sen.Rep. No. 92-414, at p. 51 (1971).) Thus, a broad interpretation of “point source” must be used when determining whether fireworks are a point source.

While a court has not yet reviewed the specific issue of whether fireworks are point sources, courts have looked at similar discharges that are not explicitly identified in the definition of a point source. Ordnance fired from a military aircraft into the water has been held to be the addition of a pollutant from a point source that requires an NPDES permit. (*Romero-Barcelo v. Brown* (1st Cir. 1981) 643 F.2d 835, 861 rev'd sub nom. *Weinberger v. Romero-Barcelo* (1982) 456 U.S. 305.) The ordnance fired from the military aircraft included accidental bombings of the navigable waters and the occasional intentional bombing of water targets. (*Weinberger v. Romero-Barcelo* (1982) 456 U.S. 305, 307.) Even though the ordnances did not frequently enter the water, the military still needed an NPDES permit to comply with the CWA. The district court, when looking at the facts, held that an NPDES permit was required notwithstanding the fact that the Environmental Protection Agency did not have any regulations governing the issuance of an NPDES permit to cover ordnances entering the water, and that there was no evidence that the ordnances had measurable deleterious effects on the water. (*Romero-Barcelo v. Brown* (D.P.R. 1979) 478 F.Supp. 646, 664 aff'd in part, vacated in part, (1st Cir. 1981) 643 F.2d 835 rev'd sub nom. *Weinberger v. Romero-Barcelo* (1982) 456 U.S. 305.)¹ When comparing fireworks to ordnances, both contain pollutants that are discharged from an untraditional source that had not been previously regulated.

Spent shot and target fragments from trap shooting over the water are also discharges of a pollutant over navigable waters. (*Stone v. Naperville Park Dist.* (N.D. Ill. 1999) 38 F.Supp.2d 651, 655; see also *Connecticut Coastal Firemen's Association v. Remington Arms Co.* (2d Cir. 1993) 989 F.2d 1305, 1313 (finding that lead and steel shot are both “pollutants” under the CWA).) In *Stone*, the court held that the trap shooting range and each firing station were a “point source” under the CWA. (*Stone v. Naperville Park Dist.*, *supra*, 38 F.Supp.2d at p. 655.) The court found that the whole purpose of the facility was to “discharge pollutants” in the form of lead shot and fragmented targets and the facility was “discernable, confined and discrete.” (*Ibid.*) Similarly, the point of the instruments that set off fireworks is to discharge pollutants, i.e. shoot the firework into the air to allow the firework to explode and produce the colorful effect we all see. The firework itself is the pollutant, much like the bullet is the pollutant at a firing range.

The interpretation of the instrument setting off the firework being the point source is confirmed by an analysis of the word “from” in the phrase “...addition of any pollutant to navigable waters from any point source.” (33 U.S.C. § 1362(12).) When looking at

¹ The district court and the 1st Circuit Court of Appeals both decided that a NPDES permit was required for the discharge; however the Supreme Court did not rule on the issue and focused entirely on another element of the case.

pesticides sprayed into the air over navigable waters from a truck and helicopter, the Second Circuit Court of Appeals found that the point source was not the air but rather the spray apparatus that was on the truck or helicopter. (*Peconic Baykeeper, Inc. v. Suffolk County* (2d. Cir. 2010) 600 F.3d 180, 188.) Even though the pesticides were being sprayed into the air, the spray apparatus was the starting point and so was the point source. (*Ibid.*) The same analysis applies to fireworks that explode in the air. The discharge comes from the instruments that shoot the fireworks into the air and not from the air after the fireworks explode. Therefore, the instruments that set off the fireworks are the point source from which the pollutants in the fireworks are discharged.

Conclusion

The CWA is designed to protect our nation's waters, and it accomplishes that task by prohibiting the discharge of pollutants from a point source without a permit. Fireworks that enter navigable waters are a discharge of pollutants from a point source. Courts have held that similar activities like firing ordnances from military aircraft or firing shots at clay targets are considered point sources. The device that sets off the firework is a discrete, identifiable instrumentality that discharges the firework into the air and causes the pollutants to enter the navigable waters. Since there is a discharge of pollutants from a point source, the San Diego Water Board may properly regulate fireworks through an NPDES permit.

San Diego Water Board Members

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