

THE CREADORE LAW FIRM P.C.  
305 BROADWAY – FOURTEENTH FLOOR  
NEW YORK, NEW YORK 10007  
Tel.212.355.7200  
Fax. 212.583.0412 Efax 212.822.1459

Donald E. Creadore - NY, MO, CT, DC  
Thomas D. Seymour – MA

New York NY  
Boston MA  
St. Joseph MO

March 7, 2011

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

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

**Re: Comment Letter- 03/11/2011 Board Workshop- Fireworks Draft Permit**

Dear Executive Director Gibson and Honorable Board Members:

This law firm represents the interests of the National Fireworks Foundation (“NFA”), and on its behalf we thank you for the opportunity to submit our comments and questions on revised Tentative Order No. R9-2010-0124, General Permit No.CAG99902 (the “Revised Tentative Order”). The implementation of the Revised Tentative Order by the San Diego Regional Water Quality Control Board (“Board”) will impact numerous members of the NFA who work in the fireworks display industry within the areas that would become subject to this Board’s jurisdiction; the additional fact that the Tentative Order is the first of its kind in the nation has far-reaching implications that can effect each of the 500+ active members of the NFA. Accordingly, the NFA submits this letter response (the “Letter Response”) to the February 8, 2011 Notice of Public Workshop (the “Public Workshop Notice”).

Realizing that it, like the Board, has a vested interest to fairly and responsibly address and resolve the issues raised by the Revised Tentative Order, the NFA has invested considerable time and money to engage the Board in a dialogue, while also allowing retained experts and consultants to explore and examine the relative merits of

the various facts and arguments underlying the Board's recently-expressed desire to regulate fireworks displays. In fact, in response to this Board's prior request for questions and comments (in connection with the prior public workshop), the NFA submitted a written response containing a detailed series of questions to the Board, each one deliberately designed to provide the NFA with a better understanding of prevailing facts and law influencing the Board's desire to now regulate public fireworks displays. The NFA is rightfully worried when a series of simple, fundamental and obvious questions go unanswered by the Board; and, for your convenience, a copy of the NFA's questions immediately follows this Letter Response. Given the absence of any meaningful information that would lead one to conclude that fireworks displays are subject to regulation by the Board under the NPDES program, the Board has seemingly exceeded its mandate and authority.

First and foremost, the NFA maintains that the Board lacks the legal authority to regulate the public display of fireworks. It is telling that the Board has not cited any precedent for its proposed exercise of authority, nor can it point to any specific statutory language supporting its contention that a public display of fireworks is a point source discharge within the plain terms or spirit of the Clean Water Act (the "CWA"). The unique qualities of fireworks displays further separates this activity from other properly regulated activities that fit comfortably within the Board's regulatory powers, such as sewage treatment plants, wastewater treatment facilities and local marinas. Fireworks display sites are temporary, and fireworks displays are, invariably, of relatively short duration; indeed, many occur only once per year. A balancing of the equities weighs heavily against burdening sponsors of fireworks displays—oftentimes, governmental or non-profit entities—with excessive enrollment and filing fees, coupled with sophisticated, and even more costly, water monitoring protocols. This is especially appropriate where, like here, there is an unexplained lack of engineering research or test results that argue or conclude that fireworks displays cause an adverse impact to the quality of "various receiving waters of the U.S." subject to the Revised Tentative Order.

It is worth repeating that the requirements of the Revised Tentative Order are not proportional to the activity sought to be regulated. Even were the NFA to find that the Board has a valid and legitimate right to regulate public fireworks displays, the NFA has credible cause to believe that the additional expense to comply with the requirements prescribed in the Revised Tentative Order will vastly exceed the present cost of the fireworks display, effectively eliminating fireworks displays that rely upon volunteer donations, and further burdening the budgets of municipalities that provide fireworks displays for its citizens.

The NFA realizes that subjecting public fireworks displays to the NPDES program will also cause irreparable damage to the industry and, more specifically, its members. The direct loss of revenues and jobs can, and will, be measured in the tens of millions of dollars in terms of lost earning and salaries, not to forget the additional tens of millions of dollars that will not flow into the cash registers of local businesses that derive

THE CREADORE LAW FIRM P.C.

substantial annual revenues from fireworks displays in Mission Bay and San Diego Bay (e.g., bars, restaurants, charter boats and ferries, hotels and taxis). It would also stand to argue that these revenue streams dwarf any monies that government may receive from enrollment fees and filing fees or, alternatively, any benefit to the water quality of Mission Bay or San Diego Bay. The Board also appears to be overlooking the entertainment value and community spirit that public fireworks displays engender, which is priceless.

The NFA remains ready to assist this Board in achieving responsible regulation. To that end, the Board should withdraw all of the scheduled deadlines (see, Draft General Permit, at Table III), all of which are self-imposed and appear to be selected in an arbitrary and capricious manner. A thorough reading of Revised Tentative Order demonstrates that the Board still confronts more questions than it has answers.

For example, despite ample opportunity and scientific resources at its disposal, the Board openly admits that it is unable to satisfy the fundamental burden to “precisely specify the point(s) at which fireworks residue becomes a pollutant waste.” (Id., at III A, p. 10). Similarly, the Board may be confusing the term hazardous waste with the term hazardous material; to the extent that display fireworks have been customarily and traditionally treated nationwide as hazardous materials by manufacturers, industry and regulators, alike, it would be valuable and meaningful to understand why the Board is seeking more stringent requirements at this time. Given the fact that the Board’s unsubstantiated finding (that public fireworks displays constitutes a point source discharge of pollutant waste) is also instrumental to its determination to subject public fireworks displays to the NPDES program, the Board’s failure to thoroughly and unambiguously define the activity sought to be regulated is not only inexcusable but is doomed to generate unjustifiable and unintended results, causing irreparable injury and hardship. See Appendix A, attached. The NFA proposes that the Board act prudently by deferring the deadlines while further study of the prevailing science, law and public policy is undertaken.

In addition to the foregoing comments and prior communications, the NFA expressly reserves all rights to challenge the actions of the California Regional Water Quality Control Board, San Diego Region, in proceeding in this manner as a violation of various statutory provisions, including provisions of the Federal and State Administrative Procedures Act, as well as to demand legal and equitable relief, including injunctive relief and attorneys’ fees.

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

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

QUESTIONS:

1. Is the San Diego Water Board relying upon any scientific or engineering research or test results that argue or conclude that fireworks displays cause an adverse impact to the quality of either receiving waters or surface water and, if so, please identify?
2. Is the San Diego Water Board relying upon any scientific or engineering research or test results that argue or conclude that fireworks displays can exceed prevailing actionable levels of reported pollutants to either receiving waters or surface waters and, if so, please identify?
3. Is the San Diego Water Board relying upon any scientific or engineering research or test results that argue or conclude that fireworks displays cause acute or chronic toxicity in receiving waters or surface water and, if so, please identify?
4. Is the San Diego Water Board relying upon any scientific or engineering research or test results that substantiate the need for testing sediment at depths of 50' and, if so, please identify?
5. Is the San Diego Water Board relying upon any scientific or engineering research or test results that argue or conclude that the display of fireworks "have the reasonable potential to cause or contribute to an exceedence of a water quality standard, including numeric and narrative objectives within a standard." And, if so, please identify?
6. Is the San Diego Water Board relying upon any scientific or engineering research or test results that argue or conclude that fireworks products in sediments "in quantities that alone, or in combination, are toxic to benthic communities and, if so, please identify?
7. Is the San Diego Water Board relying upon any scientific or engineering research or test results that argue or conclude that fireworks displays create "pollutants...in sediments at levels that will bio-accumulate in aquatic life to levels proven to be harmful to human health" and, if so, please identify?
8. Is the San Diego Water Board relying upon any scientific or engineering research or test results that argue or conclude that public displays of fireworks *discharge pollutant wastes* to surface waters and, if so, please identify?
9. What information has the San Diego Water Board received from SeaWorld that establishes that fireworks have a demonstrable adverse impact upon the quality of either receiving waters or surface water?
10. Given that "Under the terms of the Tentative Order any person who discharges or proposes to discharge pollutant wastes from a public display of fireworks to surface waters in the San Diego region *may submit a Notice of Intent...*" (emphasis added), under what circumstances will a person be exempt or excused from having to file a Notice of Intent?
11. Can a sponsor seek a waiver of enrollment and, under what circumstances shall a waiver be provided, and upon what terms?
12. Upon what circumstances will the San Diego Water Board demand "the joint submission of an NOI from both the sponsor and the person operating the fireworks event."?

THE CREADORE LAW FIRM P.C.

13. Is the San Diego Water Board relying upon any scientific or engineering research or test results that argue or conclude that fireworks displays produce or generate wastewater and, if so, please identify?
14. Is the San Diego Water Board relying upon any studies that have determined that fireworks displays involve a process of production or manufacturing, and, if so, please identify?
15. Is the San Diego Water Board relying upon any scientific or engineering research or test results that argue or conclude that fireworks are demonstrably equivalent to munitions or ammunition, and if so, please identify?
16. Is the San Diego Water Board relying upon any scientific or engineering research or test results that argue or conclude that fireworks display products constitute "pollutant wastes" as asserted in the Tentative Order, and if so, please identify?
17. What dispute process is available to Sponsors in the event that the Notice of Enrollment includes "additional or increased monitoring due to specific circumstances of the discharge,"?
18. Under what circumstances will the San Diego Water Board impose "additional or increased monitoring" requirements, and how and when will it do so?
19. Which receiving waters or surface waters are known to the San Diego Water Board to have documented and reported adverse impacts attributed specifically to particulate matter and miscellaneous debris associated with fireworks displays?
20. What background data did the San Diego Water Board rely upon in developing the requirements in the Order?
21. What studies to establish (water quality-based effluent limitations (WQBELs) have been conducted by the SDWB?
22. Why are sediment quality objectives being pursued in connection with an order relating to surface water and receiving waters?
23. What are the established effluent limits germane to fireworks displays intended to be enforced by the San Diego Water Board?
24. What are the established receiving water limits?
25. What are the "other requirements" referenced in the Order, (source, Tentative Order, page 12)?
26. Is the San Diego Water Board relying upon any scientific or engineering research or test results in deciding to impose Best Management Practices ("BMP") that are more stringent than current custom and practice and, if so, please identify?
27. How many sweeps of a fireworks display event satisfies the BMP as proposed in the Tentative Order? [BMP 'f']
28. What are "dangerous fireworks", and how are they materially different from display fireworks? [BMP 'e'].
29. How many fireworks display events does one permit cover?

THE CREADORE LAW FIRM P.C.

30. Are all-volunteer organizations subject to the Tentative Order?
31. Can co-sponsors jointly apply and, if so, how?
32. Under the Tentative Order, are the terms "discharger" and "permittee" synonymous?
33. Can a 'Discharger' be determined to be liable under the terms of the Tentative Order where it is not an enrollee and, if so, under what circumstances?
34. Under what circumstances will the San Diego Water Board require a person to also apply for an individual NPDES permit?
35. What is the intended definition of "discharger" pursuant to the Tentative Order?
36. What is the intended definition of "receiving waters" pursuant to the Tentative Order?
37. What is the intended definition of "surface water" pursuant to the Tentative Order?
38. Is the San Diego Water Board relying upon any scientific or engineering report or study that either suggests or concludes that fireworks mortars are designed to function as conveyances of pollutants and, if so, please identify?
39. Is the San Diego Water Board relying upon any scientific or engineering report or study that either suggests or concludes that a mortar containing a finished, non-ignited fireworks shell is considered a non-point source?
40. Under what circumstances would the San Diego Water Board determine that the discharge from a fireworks display will not affect, or have the potential to affect, the quality of the waters of the state, prompting the refund of all or part of the annual fee?
41. Under what circumstances would the San Diego Water Board determine to extend a waiver to fireworks displays in accordance with § 13269 of the Porter-Cologne Water Quality Control Act (Ca. Water Code, Division 7)?
42. Under what circumstances would the San Diego Water Board determine to waive the monitoring requirements described in § 13269 of the Porter-Cologne Water Quality Control Act (Ca. Water Code, Division 7)?
43. Under what circumstances would the San Diego Water Board determine that the discharge from fireworks displays will not affect, or have the potential to affect, the quality of waters of the state, prompting a exemption in accordance with § 13269 of the Porter-Cologne Water Quality Control Act (Ca. Water Code, Division 7)?

APPENDIX

1. **State of California, Regional Water Quality Control Board, San Diego Region, Executive Officer Summary Report, December 12, 2007** (“SeaWorld conducted annual fireworks related monitoring of sediment and water quality parameters between 2001-2006 as part of the Coastal Commission permit requirement. The final monitoring report prepared for SeaWorld, by Science Applications International Corporation, concluded that there were no significant spatial or temporal patterns in concentration of critical metals in sea water or sediments in Mission Bay. It was also concluded that there is no indication of fireworks residue accumulation in the water or sediment of Mission Bay.”) Accord, 2010 SeaWorld Aerial Fireworks Displays NPDES Permit Addendum Summary Report study provided to San Diego regional water quality control board (the Board expressly references the SeaWorld study in its Revised Tentative Order at Attachment F, 1D) (“Finding No. 5: SeaWorld conducted annual fireworks related monitoring of sediment and water quality parameters between 2001-2006 as part of the Coastal Commission permit requirement. The final monitoring report prepared for SeaWorld, by Science Applications International Corporation, concluded that there were no significant spatial or temporal patterns in concentration of key fireworks related metals in sea water or sediments in Mission Bay. It was also concluded that there is no indication of fireworks residue accumulation in the water or sediment of Mission Bay.”)
2. **Environmental Assessment Of The Issuance Of A Small Take Regulations And Letters Of Authorization And The Issuance Of National Marine Sanctuary Authorizations For Coastal Commercial Fireworks Displays Within The Monterey Bay National Marine Sanctuary, California, June 2006** (“NMFS and the MBNMS believe that chemical residue from fireworks does not pose a significant risk to the marine environment. No negative impacts to water quality have been detected.”; at p. 31).
3. **Results of SeaWorld Fireworks Sediment Monitoring Program Mission Bay, San Diego, March 2010 Sampling Event, May 5, 2010** (upon information and belief, a full and complete copy of this private report is in the possession or control of the San Diego Water Board).
4. **Nautilus Environmental Letter of Transmittal and Analytical Report relating to July 4, 2010 Fireworks Monitoring Results (Big Bay Boom)**, (upon information and belief, a full and complete copy of this private report is in the possession or control of the San Diego Water Board)(monitoring at Shelter Island, Harbor Island, the Embarcadero and at Seaport Village “found that the vast majority of metals analyses results indicated that total concentrations either declined between pre-firework and post-firework sampling events, or increased less than 10 percent (an arbitrary value.)” .