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March 7, 2011

VIA ELECTRONIC AND U.S. MAIL

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

Re: Comment Letter – 03/11/2011 Board Workshop – Proposed General NPDES Permit for Public Displays of Fireworks

Dear Mr. Gibson and Honorable Board Members:

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

As a threshold matter, we continue to maintain that the San Diego Regional Water Quality Control Board (“Regional Board”) does not have the legal authority to regulate the public display of fireworks. As noted in our December 9, 2010 letter, we do not believe that there is precedent rooted in federal case law or any definition in the Clean Water Act (“CWA”) that would categorize fireworks displays as a “point source” discharge under the CWA. Therefore, as a jurisdictional matter, fireworks displays cannot be regulated by the Regional Board under the NPDES program. While we understand the Regional Board nonetheless favors regulating occasional fireworks activity, we will continue to question the Regional Board’s statutory authority to do so, especially where the Regional Board has not shown that the activity to be regulated is a “point source” under the CWA and in fact, acknowledges in the Tentative Order that this activity “poses no significant threat to water quality.”¹

Without waiving any rights to dispute the threshold issue of the limits of the Regional Board’s regulatory authority, we believe that the revised Tentative Order makes thoughtful and reasonable findings based upon available science. We agree that the scientific evidence supports the conclusion that fireworks displays over water “pose no significant threat to

¹ Tentative Order at 8.

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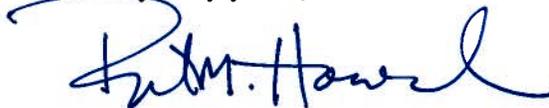
water quality”² and the “proper implementation of the BMPs” included in the Tentative Order “will assure the protection of water and sediment quality within the receiving waters.”³

It is clear from the newly released Tentative Order that Regional Board staff made significant efforts to evaluate and respond thoughtfully to the technical and procedural issues raised by the stakeholders during the prior December 16, 2010 workshop and in their prior written comments. We very much appreciate this effort. The new Tentative Order proposed by the Regional Board is responsive to many key concerns. For example, the concept of structuring the Tentative Order upon a threshold of fireworks material makes scientific and practical sense, although we are concerned that the 1,000 pounds net weight threshold for “Category 1” and “Category 2” events unnecessarily sweeps the San Diego Symphony and U.S.S. Midway fireworks displays into the highest level of regulatory oversight on par with SeaWorld. We believe the annual weight limit should be higher for such periodic, short-duration San Diego Bay fireworks displays that in the aggregate may exceed 1,000 pounds net weight annually, but which involve insignificant pyrotechnic weight during each individual event.

LJCFF also believes that the Special Provisions of the Tentative Order at Section VII.C.2 (pages 24-25) related to the Ocean Plan and discharges to the La Jolla Area of Special Biological Significance (“ASBS”) are also a reasonable approach. The launch site for the La Jolla Fourth of July fireworks display is from Scripps Park above La Jolla Cove, which is one-quarter mile outside and away from the La Jolla ASBS.

As noted above, we believe that the proposed Tentative Order and its findings have rigorously evaluated the science and strike a better balance. We have attached as Attachment “A” a list of comments on specific areas of the Tentative Order that we believe are necessary to better refine and improve the Tentative Order. We have also attached as Attachment “B” relevant pages of the Tentative Order with our proposed redline changes. We look forward to working with Regional Board staff in the future and thank the staff for the many improvements in the revised Tentative Order.

Very truly yours,



Robert M. Howard
of LATHAM & WATKINS LLP

Attachments

cc: Deborah Marengo (w/attachments)
Adam Harris (w/attachments)

² Tentative Order at 8

³ Tentative Order at 26

ATTACHMENT "A"

**LA JOLLA COMMUNITY FIREWORKS FOUNDATION
COMMENTS ON TENTATIVE ORDER R-9-2011-0022**

Section	Comment
II.B, p. 6	This section states that the Regional Board may require the joint submission of a Notice of Intent ("NOI") from both the sponsor and operator of the fireworks display. It is common for the operator of the fireworks display to handle regulatory permits from the Coast Guard, local fire agency, and others. It is likely that the NOI will become a similar service provided by the operator. Only one NOI, processed by the operator should be required. Non-profit groups sponsoring these events do not have the expertise or manpower to track these regulatory requirements.
II.C, p. 7	No later than June 10, 2011, or 24 days prior to the Fourth of July event in 2011, and 60 days starting in 2012, is not practicable or reflective of when this Order will be implemented.
II.C & II.D, pp. 7-8	These sections deal with the NOI and Notice of Enrollment ("NOE"). It is unclear whether a sponsor of a fireworks show will need to complete a NOI each year, prior to an annual Fourth of July fireworks show, and obtain a new NOE each year. Will a single NOI (and payment) in the first year of permitting followed by an NOE issued by the Regional Board suffice for the life of the Order, as long as no changes to the display are made?
II.F, p. 8	This section indicates that the current fee for enrollment under the Tentative Order will be \$1120. This fee seems excessive, and beyond the required fee to process and oversee the Tentative Order, given the low level of regulatory oversight required by the Regional Board. We would suggest that two tiers of fees be applied; one for fireworks displays over 1,000 pounds, and one for displays under 1,000 pounds. It is clear from the permit that displays using less than 1,000 pounds of pyrotechnic material will pose no threat to water quality, and therefore minimal oversight will be required.

Section	Comment
III.A, p. 10	<p>We respectfully disagree with the unsupported jurisdictional premise, “Residual firework pollutant waste discharged into surface waters constitutes discharge of pollution from a point source within the meaning of the CWA. Therefore coverage under an NPDES permit is required.” Although we believe that the new Tentative Order provides a much better framework, we reserve our right to challenge a first-in-the-nation administrative determination that fireworks constitute a “pollutant discharge from a point source” under the CWA. Staff’s prior justification that the San Diego SeaWorld displays received a NPDES permit misses the point that SeaWorld voluntarily agreed to permitting. One party’s voluntary agreement to bind itself to a permit is not the same thing as a judicial determination of regulatory jurisdiction.</p>
III.I and VII.C.2 and throughout the Tentative Order, pp. 13-14, p.VI-41	<p>The Tentative Order provides special provisions and findings under the California Ocean Plan that will allow for the temporary discharge of fireworks material over the La Jolla ASBS. The Tentative Order states, “This Order establishes requirements for the continued discharge of residual fireworks pollutant waste by the La Jolla Community Fireworks Foundation into the La Jolla ASBS in San Diego County.” (p. 14.) Please revise the language of this section to allow for a successor annual sponsor to obtain this right. For example, please change the language to read, “This Order establishes requirements for the continued discharge of residual fireworks pollutant waste by the La Jolla Community Fireworks Foundation (or a successor sponsor of the Fourth of July fireworks) into the La Jolla ASBS in San Diego County.” On pages VI-41 and VI-42, the Tentative Order calls for information specific to the La Jolla Fourth of July event. The event has taken place for approximately 26 years, or since approximately 1984. The annual event conducted by the La Jolla Community Fireworks Foundation typically runs approximately <u>20-25</u> minutes and during that time <u>less than 1,000 pounds</u> (net weight) of aerial shells are ignited and launched. It is estimated that the 2010 event involved less than 500 pounds net weight of pyrotechnics. The rest of the requested information calls for such a level of detail from the past 26 shows that it cannot be confirmed at this juncture and is not necessary to the findings in the Tentative Order.</p>

Section	Comment
V.B.1, p. 19	<p>The terms “practicable” and “economically feasible” are used in this section, but neither is defined in the Tentative Order. LJCFF contracts with a licensed, professional pyrotechnic company and is subject to the availability of the fireworks that they are able to acquire. We are concerned that this section could become a point of contention or future litigation because of the imprecise nature of the terms and what level of annual due diligence is required. The issue is an “industry standards” issue, not a “specific event” inquiry. We believe that V.B.1 should be removed from the Tentative Order entirely to avoid future litigation against specific events. Alternatively, the Order should specify which fireworks meet “industry standards” until the Order is renewed.</p>
V.B.2, p. 19	<p>This section requires the permittee to consider alternative firing ranges. The La Jolla Fourth of July fireworks displays have been launched from the same location (Scripps Park, La Jolla) for the last 26 years and have caused no degradation of water quality or impacts on surrounding land uses. The location allows spectators to walk to the park, provides an open and free environment to watch the display, and is located centrally in the village of La Jolla to provide maximum benefit to the local business community. Therefore, we believe that Scripps Park is the best and most appropriate location for the annual La Jolla event. We do not believe that we should be required to justify the current location of the event for 2011 or each and every subsequent year.</p>
V.B.5, p. 20	<p>“Collected material must be managed as hazardous waste.” Please revise this language to read: “Collected materials must be managed as hazardous waste and disposed of consistent with their legal classification.”</p> <p>Unexploded fireworks or exploded debris such as cardboard should be treated as required under current laws for disposal of such items. It is not appropriate for the Regional Board to create a separate regulatory regime for unexploded fireworks or exploded debris. Pyrotechnic companies provide removal and disposal services that are in compliance with all rules for collection and disposal of such material. Treatment as “hazardous waste” could require a hazardous waste disposal plans and waste discharger ID numbers and other regulatory requirements that are unnecessary and financially prohibitory.</p>
VII.C.2, pp. 24-25	<p>These provisions are acceptable. The LJCFF appreciates staffs attention to this point. LJCFF would note that the La Jolla Fourth of July Fireworks display is launched from Scripps Park, which is located one-quarter mile from the La Jolla ASBS.</p>

Section	Comment
Attachment C, pp. C-1 – C-2	<p data-bbox="553 289 1398 394">Please change the second sentence in the “Post Event Report” to read: “Reports for <u>category 1 dischargers</u> shall be submitted to the San Diego Water Board...”</p> <p data-bbox="553 426 1390 457">We are unclear as to what “Solid Rocket Gross Weight” refers to.</p> <p data-bbox="553 489 1373 552">Page C-2: With regard to “environmentally friendly” fireworks, please see our comment on section V.B.1.</p> <p data-bbox="553 590 1430 909">Page C-2: “Defective Shells – List Manufacturer’s Name, Size of Shell, and Malfunction”: Investigation and scientific determinations about the source of any malfunction in defective shells is not something that LJCFE is qualified to provide. LJCFE contracts with a professional and licensed pyrotechnic company for a fireworks display, and it relies on the operator of the event for operation and cleanup. LJCFE is neither qualified nor equipped to provide the type of forensic investigation services called for by Attachment C. We believe that this section should be removed from Attachment C.</p>

ATTACHMENT "B"

Redlined relevant pages from Draft Tentative Order No. R9-2011-0022.

GENERAL PERMIT FOR
TENTATIVE ORDER NO. R9-2011-0022
PUBLIC DISPLAY OF FIREWORKS

depending on wind speed and direction, size of the shells, the angle of mortar placement, the type and height of firework explosions and other environmental factors. Once the fireworks residue enters a water body it can be transported to waters and shorelines outside the fallout area due to wind shear and tidal effects. The Clean Water Act (CWA), at section 301(a), broadly prohibits the discharge of any pollutant to waters of the United States, except in compliance with a National Pollutant Discharge Elimination System (NPDES) permit. Residual firework pollutant waste discharged into surface waters constitutes discharge of a pollutant from a point source within the meaning of the CWA. Therefore, coverage under an NPDES permit is required before residual firework pollutant waste can be lawfully discharged.

This Order requires implementation of Best Management Practices (BMPs) described in Section V.B of this Order to ensure the pollutant waste discharges associated with the public display of fireworks do not cause pollution or nuisance conditions in surface waters within the San Diego Region. This Order also requires post firework event monitoring and reporting as well as receiving water monitoring and reporting for discharges meeting certain specific criteria described under specific conditions in Attachment E of this Order.

II. PERMIT COVERAGE AND APPLICATION REQUIREMENTS

A. General Permit Coverage

This General Permit covers the point source discharge of residual firework pollutant waste to surface waters resulting from the public display of fireworks, including but not limited to fireworks using aluminum, antimony, barium, carbon, calcium, chlorine, cesium, copper, iron, potassium, lithium, magnesium, oxidizers including nitrates, chlorates and perchlorates, phosphorus, sodium sulfur, strontium, titanium, and zinc.

Users of fireworks containing these and other pollutant wastes for public shows or events are required to obtain coverage under this General Permit prior to the public display of fireworks.

B. Discharger Eligibility Criteria

Any person who proposes to discharge pollutant waste from the public display of fireworks to surface waters of the U.S. in the San Diego Region may submit a Notice of Intent (NOI) for coverage under this Order. The NOI may address multiple fireworks events at different locations throughout the San Diego Region. When a fireworks event(s) is sponsored by one ~~person~~ entity but is operated or conducted by another ~~person~~ entity, it is the sponsor's

GENERAL PERMIT FOR
TENTATIVE ORDER NO. R9-2011-0022
PUBLIC DISPLAY OF FIREWORKS

~~operator's duty to submit an NOI and obtain coverage under this Order. The San Diego Water Board may require the joint submission of an NOI from both the sponsor and the person operating the fireworks event on a case-by-case basis.~~

C. General Permit Application

To obtain coverage under this Order, Dischargers must submit a complete application containing the items below to the San Diego Water Board no later than 60 days prior to a fireworks event. During the period of May 11, 2011 through June 10, 2011 Dischargers must submit the complete application no later than 24 days prior to a fireworks event. The application must contain the following items:

1. A completed Notice of Intent (NOI) form shown as Attachment B signed in accordance with the signatory requirements of the Standard Provisions in Attachment D, Section V.B.1. Signatory and Certification Requirements;
2. Payment of the annual application fee, equal to the first annual fee, made payable to State Water Resources Control Board or "SWRCB"; and
3. A Fireworks Best Management Practices Plan.

The NOI, including, the application fee, and other attachments must be submitted to the following address:

CRWQCB – San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Attn: Fireworks General NPDES Order
NOTICE OF INTENT

D. Notice of Enrollment

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

GENERAL PERMIT FOR
 TENTATIVE ORDER NO. R9-2011-0022
 PUBLIC DISPLAY OF FIREWORKS

Discharge Point	Receiving Water	Beneficial Uses
Various	Pacific Ocean	Industrial water supply; water contact and non-contact recreation, including aesthetic enjoyment; navigation; commercial and sport fishing; mariculture; preservation and enhancement of designated Areas of Special Biological Significance (ASBS); rare and endangered species; marine habitat; fish spawning and shellfish harvesting

Section III.E.1 of the Ocean Plan provides that waste shall not be discharged to areas designated as being of special biological significance (ASBS). Section III.E.2. provides that the Regional Water Boards may, however, approve waste discharge requirements or recommend certification for limited-term (i.e. weeks or months) activities in ASBS. Limited term activities may result in temporary and short-term changes in existing water quality. Water quality degradation shall be limited to the shortest possible time. The activities must not permanently degrade water quality or result in water quality lower than that necessary to protect existing uses, and all practical means of minimizing such degradation shall be implemented.

This Order establishes requirements for the continued discharge of residual firework pollutant waste by the La Jolla Community Fireworks Foundation or their successors into the La Jolla ASBS in San Diego County and the City of Laguna Beach into the Heisler Park ASBS in Orange County.

In order to protect the beneficial uses, the Ocean Plan establishes water quality objectives and a program of implementation. Requirements of this Order implement the Ocean Plan.

- J. National Toxics Rule (NTR) and California Toxics Rule (CTR).** USEPA adopted the NTR on December 22, 1992, and later amended it on May 4, 1995 and November 9, 1999. About forty criteria in the NTR applied in California. On May 18, 2000, USEPA adopted the CTR. The CTR promulgated new toxics criteria for California and, in addition, incorporated the previously adopted NTR criteria that were applicable in the state. The CTR was amended on February 13, 2001. These rules contain water quality criteria for priority pollutants.
- K. State Implementation Policy.** On March 2, 2000, the State Water Board adopted the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP). The SIP became effective on April 28, 2000 with respect to the priority pollutant criteria promulgated for California by the USEPA through the NTR and to the priority pollutant objectives established by the San Diego Water Board in the Basin Plan. The SIP became effective on May 18, 2000 with respect to the priority pollutant criteria promulgated by the USEPA through the CTR. The State Water Board adopted amendments to the SIP on February 24, 2005 that became

GENERAL PERMIT FOR
TENTATIVE ORDER NO. R9-2011-0022
PUBLIC DISPLAY OF FIREWORKS

V. DISCHARGE SPECIFICATIONS

A. Effluent Limitations – Not Applicable

B. Fireworks Best Management Practices Plan (FBMPP)

The Discharger shall prepare and implement a Fireworks Best Management Practices Plan (FBMPP) to prevent or reduce the discharge of pollutants associated with the public display of fireworks. The FBMPP shall address, at a minimum, the following elements:

1. ~~Whenever practicable and economically feasible, the Discharger shall consider the use of "environmentally friendly" fireworks produced with new pyrotechnic formulas that replace perchlorate with other oxidizers and propellants that burn cleaner, produce less smoke and reduce pollutant waste loading to surface waters.~~
2. ~~Whenever practicable and feasible, the Discharger shall design the firing range, or consider alternative firing ranges, to eliminate or reduce residual firework pollutant waste discharges to waters of the United States.~~
3. As soon as practicable, and no later than 24 hours following a public display of fireworks, the Discharger, in addition to complying with title 19 of the California Code of Regulations, section 1003, shall, to the extent practical, collect, remove, and manage particulate matter and debris from ignited and un-ignited pyrotechnic material including aerial shells, stars (small pellets of composition that produce color pyrotechnic effects), paper, cardboard, wires and fuses found during inspection of the entire firing range and adjacent affected surface water(s).
4. If the fireworks are launched or ignited on barges, the barges shall be setup in accordance with the requirements, and under the supervision of the Fire Department having jurisdiction. The "mortars" used to hold and launch the fireworks shall be secured properly and use fire-retardant material, such as sand, in accordance with local codes. Barges shall be inspected for leaks and other potential safety issues. Wires used to trigger the fireworks shall be secured on the barges to prevent the wires from being pulled into the air and falling into the water. As soon as practicable, and no later than 24 hours following a public display of fireworks, the Discharger shall sweep the decks of each barge to prevent debris and other solid waste from blowing into the water. The barges shall be returned to the loading or setup area to be further cleaned and to have the mortars removed.

GENERAL PERMIT FOR
TENTATIVE ORDER NO. R9-2011-0022
PUBLIC DISPLAY OF FIREWORKS

5. Immediately following a public display of fireworks, the Discharger shall collect and remove unexploded fireworks, including duds and misfires, ~~and return them directly to the wholesaler/manufacturer.~~ Collected material must be managed as hazardous waste and disposed of consistent with their legal classification.
6. All debris including fuses, wires, and wrappings shall be properly disposed in trash receptacles as the fireworks display is set up.
7. Fireworks shall be packaged, transported, stored, set-up, and handled in accordance with California Code of Regulations, Title 19, Division 1, Chapter 6, *Fireworks* and Title 22, Chapter 33, *Best Management Practices for Perchlorate Materials* in order to prevent or minimize firework pollutant wastes from entering surface waters.
8. Residual firework pollutant waste discharges shall be located a sufficient distance from areas designated ASBS to assure maintenance of natural water quality conditions in these areas, except as provided in Section VII.C.2, *Special Provisions for Discharges into La Jolla and Heisler Park ASBS* of this Order.
9. The Discharger shall establish procedures to ensure that all required permits, licenses, and approvals (i.e. State Fire Marshal's license, United States Coast Guard Marine Event Permit, etc.) from other governmental agencies for the public display of fireworks are obtained prior to the event.

C. Public Fireworks Display Log

The Discharger shall maintain a written log for each public fireworks display event. The log shall be completed within 5 days following each public fireworks event and shall be made available to the San Diego Water Board upon request. The log shall contain the following information:

1. The name of the organization sponsoring the fireworks event, together with the names and license numbers of the pyrotechnic operators actually in charge of the display;
2. The date, time, and duration of the public fireworks event;
3. The location of the public fireworks event;
4. The affected receiving waters;

GENERAL PERMIT FOR
TENTATIVE ORDER NO. R9-2011-0022
PUBLIC DISPLAY OF FIREWORKS

C. Special Provisions

1. Reopener Provisions

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

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

Discharges of residual fireworks pollutant waste by the La Jolla Community Fireworks Foundation or their successor or follow on sponsor for the La Jolla Fourth of July Fireworks event into the La Jolla ASBS and by the City of Laguna Beach into the Heisler Park ASBS may continue subject to the following conditions:

- a. The residual firework pollutant waste discharges shall be limited to those resulting from one Fourth of July celebration public fireworks display event per calendar year.
- b. The net explosive weight of fireworks used in the public fireworks display event shall not exceed 1,000 pounds of pyrotechnic material.
- c. The areal extent of the firing range in the ASBS shall be limited to the maximum extent practicable to prevent or reduce residual firework pollutant waste discharges in the ASBS.
- d. The residual firework pollutant waste discharges shall not permanently alter natural water quality conditions in the ASBS receiving waters. Short term temporary excursions from natural ocean water quality⁵ conditions resulting from residual firework pollutant waste discharges within any portion of the firing range located in the ASBS are permissible if beneficial uses are protected.
- e. The residual firework pollutant waste discharges shall comply with all other applicable provisions, including water quality standards, of the Ocean Plan.

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

GENERAL PERMIT FOR
 TENTATIVE ORDER NO. R9-2011-0022
 PUBLIC DISPLAY OF FIREWORKS

NPDES NO. CAG999002

III.
ATTACHMENT C – PUBLIC DISPLAY OF FIREWORKS POST EVENT REPORT FORM

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
 SAN DIEGO REGION**

POST FIREWORKS DISPLAY REPORT

This form shall be completed no later than five (5) days following a public display of fireworks event and made available to the San Diego Water Board upon request. Reports for category 1 dischargers shall be submitted to the San Diego Water Board in accordance with the schedule outlined in Section X.B.3 of the Monitoring and Reporting Program.

Completed forms may be submitted electronically on compact disk or by hard copy to the San Diego Water Board office. The San Diego Water Board may accept electronic submission of this form (Check with the San Diego Water Board before submitting electronically).

Name of Organization Sponsoring the Event		WDID No.
Contact Person for Organization Sponsoring the Event: Name: Phone Number: Email:		
Location of Event – Address and GPS Coordinates		Name of Receiving Water(s)
Date of Display	Time of Display FROM .M to .M	
Map. Attach a map or diagram identifying the firing range, adjacent shorelines, quays, and docks, any other appropriate features of the firing range and adjacent affected surface water(s). The firing range is that area over which fireworks may travel by design or accident and upon which firework pollutant waste may fall. It includes the fireworks launching area and adjacent shorelines, quays, docks and the fireworks fallout area.		
Name and License No. of Pyrotechnic Operators		
1.		
2.		

GENERAL PERMIT FOR
 TENTATIVE ORDER NO. R9-2011-0022
 PUBLIC DISPLAY OF FIREWORKS

NPDES NO. CAG999002

3.									
Particulars of Display*						Low Level Items*		Ground Displays*	
Shell Size	No. Single Breaks	No. Multi Breaks	Shell Size	No. Single Breaks	No. Multi Breaks	Type	Qty	Type	Qty
25 mm			7"			MINES		SETS	
80 mm			8"			ROMANS		DEVICES	
2"			9"			COMETS			
3"			10"			CAKES			
4"			11"						
5"			12"						
6"									
Net Explosive Weight:									
Solid Rocket Motor Gross Weight:									
Were "environmentally friendly" fireworks used? If so, indicate which fireworks were environmentally friendly.									
Defective Shells - List Manufacturer's Name, Size Of Shell, And Malfunction.*									
Were the entire firing range (including the fireworks launching area, adjacent shorelines, quays, docks and the fireworks fallout area), barge(s) (if used) and adjacent surface water(s) inspected and cleaned of particulate matter and debris from ignited and un-ignited pyrotechnic material within 24 hours following the display?									
<input type="checkbox"/> Yes Date _____ Time _____ <input type="checkbox"/> No If no, explain:									
Amount of debris collected from the firing range: _____ lbs dry weight									
Amount of floating debris collected from adjacent surface water(s): _____ lbs wet weight _____ lbs dry weight (if known)									

