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April 20, 2011

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

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

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

Dear Executive Director Gibson and Honorable Board Members:

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

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

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

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

The Activity Is Not Subject To Regulation Under The CWA

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

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

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

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

The Activity Does Not Exceed Actionable Levels

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

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

The Known Costs Of The Tentative Order Outweighs The Unknown Benefits

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

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

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

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

Conclusion

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

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

  
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Donald E. Creadore