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December 9, 2010

VIA E-MAIL & FEDERAL EXPRESS

Executive Officer Gibson and Honorable Board Members
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

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Re: Revised Tentative Order No. R9-2010-0124, NPDES No. CAG999002; General Waste Discharge Requirements for Discharges Associated With The Public Display Of Fireworks To Surface Waters in the San Diego Region

Dear Mr. Gibson and Honorable Board Members:

Thank you for the opportunity to submit comments in advance of the December 16, 2010 workshop on Tentative Order No. R9-2010-0124 regarding General Waste Discharge Requirements for the Public Display of Fireworks in the San Diego Region (“Tentative Order”), released by the San Diego Regional Water Quality Control Board (“Regional Board”) on September 23, 2010. We submit these comments on behalf of the La Jolla Community Fireworks Foundation (“LJCFF”), a non-profit corporation organized for the purpose of promoting patriotism and community spirit by preserving La Jolla’s Fourth of July tradition with a public fireworks display.¹

We are very concerned that the Regional Board staff has proposed a new, unnecessary and nation-wide precedent-setting regulatory regime for future public fireworks displays, without any significant public input and, more importantly, without any scientific basis. Quite simply,

¹ As noted in our prior correspondence of November 19, 2010, these comments cannot begin to address fully all of the significant legal, technical, economic, and practical considerations that may arise from the current Tentative Order because several key components of the Tentative Order have not been made available to the public, including, by the Regional Board’s own admission, potential modifications “including clarifying language, adding definitions and modifying receiving water monitoring requirements.” However, in the interest of ensuring a productive and meaningful public workshop on December 16, 2010, we submit these comments with regard to the Tentative Order as it currently stands. We look forward to providing further comments on the Revised Tentative Order, when that document becomes available, and participating in a further public workshop at that time.

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the Tentative Order is a regulation seeking a problem. There have been no showing of problems or water quality issues presented to the Regional Board that justify the issuance of this Tentative Order and the onerous regulatory requirements set forth therein. The burdensome regulations, testing and reporting requirements will almost certainly prevent most coastal communities in the San Diego region from participating in a patriotic fireworks tradition that dates back over 200 years. Importantly, no regulatory body in the nation has found it necessary or appropriate to regulate any one of the countless fireworks displays that have occurred during the almost forty years that the Clean Water Act has been in existence. And any attempt to justify the terms of the Tentative Order based on the current fireworks displays put on by SeaWorld is preposterous when one considers that the SeaWorld events occur for over 100 consecutive days from a barge in an enclosed, shallow bay, whereas, by way of example, Fourth of July fireworks are a once-a-year event that last a matter of mere minutes.

We would therefore request that the Regional Board withdraw this Tentative Order, and, as has been done for inland fireworks displays, issue a General National Pollution Discharge Elimination System (“NPDES”) permit exemption for public fireworks displays that occur from the same coastal location between four to ten times a year.² In the alternative, the Regional Board should revise the Tentative Order to implement a de minimis exception for those public fireworks displays which occur from the same coastal location less than ten times a year and/or detonate no more than a reasonable annual threshold of pyrotechnical material, a threshold that can be reached through consultation with water quality consultants.

I. THE TENTATIVE ORDER WOULD REGULATE FOURTH OF JULY FIREWORKS OUT OF EXISTENCE

A. Implementation of the Tentative Order Would Result in Cancellation of Most Coastal Community Fireworks Displays

First and foremost, the Regional Board must understand that the Tentative Order as it now stands would result in the cancellation of most, if not all, San Diego area community fireworks displays as a result of the high cost of compliance with the Tentative Order’s demanding regulations, testing and reporting requirements. Financed by small individual community contributions, these long-standing patriotic celebrations would be permanently shut down if communities are forced to produce enough capital to comply with the unnecessary and duplicative provisions of the Tentative Order.

² The first order of business before the Regional Board purports to regulate all fireworks is to understand the source of fireworks displays that take place within its jurisdiction. The Tentative Order makes clear that no effort has been undertaken to understand the nature and extent of the regional fireworks displays that it is now attempting to regulate. For example, the Tentative Order contains no information on how the frequency or specific location of public fireworks displays affect receiving waters. Before issuing a blanket General Permit that purports to apply to all public fireworks displays, the Regional Board must make a greater effort to study the very activity that it now seeks to regulate.

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As an example, the La Jolla Cove fireworks display has been an annual community celebration for over 25 years. This year's 2010 display lasted 23 minutes, at a total cost of approximately \$30,000. Yet the Tentative Order proposes water quality and sediment monitoring that local water quality consultants have estimated will cost between \$30,000 and \$100,000, thereby doubling or quadrupling the cost of the event and making any single event cost prohibitive. The City of Santee, in a prior comment letter on the Tentative Order, estimated that the basic cost of compliance with the Tentative Order is likely \$20,000. Even this lower cost estimate would still almost double the cost of most local celebrations, making such events impossible to finance and produce.

Far from some large corporate event, the \$30,000 budget for the La Jolla celebration is gathered through contributions from local individuals and businesses that range on average from \$50 to \$200. There are no deep-pocketed corporations putting on the event. Instead, the event is sponsored by the local population as a matter of civic and national pride. In fact, this year more than others, the loss of a major business donor due to the economic climate almost cancelled the event. Had hundreds of average La Jolla citizens not stepped in to make small contributions, the tradition would have ended. Yet, notwithstanding the recent economic decline, the Tentative Order now expects these same citizens to produce almost double or quadruple the amount of contributions to prove a negative – that no significant sediment or water quality impacts occur from occasional fireworks displays; this simply won't happen.

It is our understanding that fireworks displays in Ocean Beach, Carlsbad, Oceanside and other small San Diego communities are produced on similar budgets and similarly financed through community contributions; the substantial additional expense required under the Tentative Order for permit compliance paperwork, water monitoring and sediment testing will certainly crush the budgets of these shows. The end result of the Tentative Order will thus be a massive cancellation throughout the San Diego region of most, if not all, small community fireworks celebrations, with no resulting improvement in water quality.³

³ For example, the Best Management Practices (“BMPs”) required under the Tentative Order are no more protective than clean-up procedures already taken by event organizers, but certain aspects of these BMPs would render the cost of these events entirely prohibitive. By way of example, the Tentative Order requires unexploded fireworks and debris to be collected, which is already done following displays and has been for decades, but the Tentative Order would require event organizers to treat the debris as hazardous waste. Tentative Order, at VI.C.3.g.

First, the Regional Board does not have the statutory authority to define what is or is not hazardous waste under California's Hazardous Waste Control Law (CAL. HEALTH & SAFETY CODE § 25100 *et seq.*); this impermissible *ultra vires* act is void and unenforceable. Second, even if the Regional Board could act here, the Tentative Order demonstrates no scientific basis to deem the minor amounts of debris from fireworks displays, which are essentially cardboard and crate paper, as hazardous waste. Third, the treatment of this material as hazardous waste requires a hazardous waste removal and

II. THE REGIONAL BOARD HAS NO JURISDICTION TO REGULATE PUBLIC DISPLAYS OF FIREWORKS AS THEY ARE NOT A “POINT SOURCE” UNDER FEDERAL CLEAN WATER ACT

A. Fireworks Are Not A “Point Source” Under the Clean Water Act

Even if San Diego communities could conceivably raise enough capital annually to finance the permit fee, water monitoring and sediment testing requirements of the Tentative Order, the Regional Board has no legal jurisdiction to require these community organizers to comply with the terms of the Tentative Order. As explained below, occasional public fireworks displays detonated above or near water cannot be considered a “point source” under the federal Clean Water Act (33 U.S.C. § 1251 *et seq.*) (“CWA”), and thus the Regional Board has no legal basis for regulating these displays.

The CWA empowers states to administer the NPDES permit program, under which entities such as the Regional Board are authorized to issue and administer NPDES permits. 33 U.S.C. § 1342(b). However, the CWA requires such permits only when pollutants are discharged from a “point source.” 33 U.S.C. § 1362(12). As explained below, the legislative history of the CWA, EPA regulations, and federal case law all confirm that individual fireworks displays are not “point sources” under the CWA and thus cannot be regulated by the Regional Board under the NPDES program.

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 legislative history of the Act suggests that Congress meant to cover discharges that were at least “frequent,” or that resulted in some “measurable” waste entering the water. *Northwest Env'tl. Def. Ctr. v. Brown*, 617 F.3d 1176, 1183 (9th Cir. 2010). Here, the evidence shows that occasional celebratory and civic public fireworks displays are neither “frequent” nor result any “measurable” amount of waste entering the water; thus, it makes sense that no regulatory body in the nation, including the U.S. Environmental Protection Agency (“EPA”) which has primary jurisdiction for nationwide enforcement of the CWA, has ever attempted to regulate such displays as a “point source” under the CWA.

Given the Regional Board’s sudden and unexplained desire to enter into this previously unregulated area, one wonders what exactly is the Board’s definition of “point source.” Is it a barge-launched display such as the SeaWorld shows? Is it a coastal land-based display where the fireworks are projected over water? Or is it a coastal land-based display where the fireworks

disposal program, as well as transportation and disposal of the material at a hazardous waste facility. The additional and unnecessary expenses of creating a hazardous waste plan and paying special transportation and disposal fees for this debris would likely run into the tens of thousands of dollars, adding to an ever-growing list of costs which will preclude the smaller community fireworks events from occurring.

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explode over land? Notably, the Regional Board already provides a permit exemption for inland fireworks; yet at some ill-defined location near the coast, this now-exempt activity apparently becomes a regulated “point source” under the Regional Board’s odd interpretation of the CWA. The Tentative Order does not explain how far inland a theoretical “point source” must be launched from before it becomes a non-regulated fireworks display. Additional considerations that should play into the Regional Board’s interpretation of “point source” include the amount of pyrotechnics, the specific mechanics of how this activity is performed, how close the activity may be come to bodies of water or other watersheds, etc. But none of these issues is addressed in the Tentative Order.

The federal regulations interpreting the definition of “point source” focus on various industrial categories such as dairy products processing; grain mills; the textile industry; cement manufacturing; feed lots; fertilizer manufacturing; nonferrous metals manufacturing; steam electric power generating; leather tanning; asbestos manufacturing; and coal mining. 40 C.F.R. § 405 *et seq.* While the regulations include explosives manufacturing as a specified category of regulated point sources, fireworks displays are not referred to anywhere in the regulations. Given the breadth of regulations existing with regards to other potential “point sources,” a logical conclusion from this conspicuous regulatory absence is that Congress does not consider occasional public fireworks displays detonated above water to constitute a “point source” discharge under the CWA.

Federal courts have held that activities and “sources” such as people, grazing cows, and even a building from which trash and runoff ran into a river are not “point sources.” *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643 (2d Cir. 1993); *Oregon Natural Desert Ass’n v. Dombeck*, 172 F.3d 1092 (9th Cir. 1998); *Hudson Riverkeeper Fund v. Harbor at Hastings Assocs.*, 917 F. Supp. 251 (S.D.N.Y. 1996). The Second Circuit has stated that the definition of “point source” and the examples given by Congress “evoke images of *physical structures and instrumentalities* that systematically act as a means of conveying pollutants from an industrial source to navigable waterways.” *Plaza Health Labs., Inc.*, 3 F.3d at 646 (emphasis added). The individual fireworks displays at issue here do not systematically convey pollutants because they take place only once or twice per year, nor are they an industrial source of pollutants. Similarly, occasional fireworks displays are not comparable to the year-after-year deliberate bombing of water-based targets and disposal of million of pounds of military munitions into the ocean surrounding Vieques Island. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 307 (1982).

By enacting the CWA, Congress intended to target “industrial and municipal production of pollutants,” not infrequent activities such as fireworks displays. *Plaza Health Labs., Inc.*, 3 F.3d at 650. The Tentative Order would constitute the first and only interpretation in the country that public fireworks displays are a “point source” discharge under the CWA. It simply cannot be reasonably argued that occasional coastal fireworks displays fall within the definition of “point source” discharge under federal law.

B. Regulation of Fireworks as a “Point Source” Would Lead To Absurd Conclusions

Any attempt by the Regional Board to label occasional public fireworks display as a “point source” under the CWA would inevitably lead to a slippery slope of endless regulation

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with illogical results. For example, if once- or twice-yearly fireworks displays constitute a “point source,” then the Regional Board by necessity must also require a NPDES permit for any plane flying over the ocean whose engines discharge particulates, or any person entering the ocean with non-waterproof sunscreen, or even a person caught littering in a body of water. All of these sources produce far more cumulative “pollutants” and occur infinitely more frequently than a 23-minute Fourth of July fireworks display; yet the Regional Board has correctly not seen fit to regulate any of these discharges as a point source under the CWA. No doubt the Regional Board recognizes that it does not have the legal authority to do so under the CWA, and such regulation would result in an endless permitting fiasco. The Regional Board should now apply those same principles here and provide a general NPDES permitting exemption for occasional public fireworks displays.

The characterization of Fourth of July fireworks displays as a “point source” is a fantastic and inappropriate expansion of the term as it is used in the CWA; it is tantamount to the San Diego Regional Board legislating a new definition of the term. Fireworks displays have been a national tradition dating back to the founding of the United States and have never been held by the EPA or any court to be subject to NPDES permitting. Indeed, the Regional Board staff cites no legal authority or regulatory guidance from U.S. EPA or any other state agency to support its contention that this activity suddenly needs regulation. In fact, neither the U.S. EPA, Congress, the US, California State Water Resources Control Board, nor any other Regional Board in the State of California or similar body in another State has defined a Fourth of July Fireworks display as a “point source.” The precedent proposed by Regional Board staff is especially breathtaking given the massive coastal Fourth of July fireworks events that occur over water in Boston, New York, Philadelphia, Baltimore, and Washington D.C., among others. If the CWA requires the regulation of occasional public fireworks displays, why has the U.S. EPA and other state and local agencies with NPDES permitting authority chosen to ignore the aforementioned displays that occur in their very own backyards? The reason is obvious; no such regulation is required.

In this case, the Regional Board would overstep its authority and embark on a complete re-write of the CWA. Occasional public fireworks events occurring between four and ten times per year (or which comprise no more than a certain threshold of pyrotechnics) should be treated as exempt from any NPDES permitting requirements.

III. EVEN IF THE REGIONAL BOARD HAS JURISDICTION TO REGULATE PUBLIC DISPLAYS OF FIREWORKS, SUCH DISPLAYS QUALIFY AS A DE MINIMIS EXCEPTION TO NPDES PERMITTING

Even assuming that the Regional Board has the legal authority to regulate infrequent public fireworks displays under the CWA, which is not the case, the Tentative Order should be amended to treat fireworks displays that occur on the order of four to ten times a year as a de minimis exception under any general NPDES permit.

State law defines a de minimis source as “types of wastes that have low pollutant concentrations and are not likely to cause or have a reasonable potential to cause or contribute to an adverse impact on the beneficial uses of receiving waters yet technically must be regulated

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under an NPDES permit.” 23 Cal. Code of Regs. § 2200, n. 15. Occasional public fireworks displays, such as the La Jolla community display, undoubtedly fit squarely within this de minimis definition (even assuming the NPDES permitting program applies at all), as the evidence in the record demonstrates that there are little to no water quality impacts associated with these displays, as explained more fully below.

The Tentative Order appears to be incorrectly and inappropriately based on the unique facts of SeaWorld’s daily fireworks displays. But even if the SeaWorld fireworks shows could be analogized here, water monitoring data obtained from those same Mission Bay barge-launched displays confirm that even after such a high level of frequency in a shallow water body with limited circulation, public fireworks displays result in almost undetectable levels of various constituents above background levels and thus constitute a de minimis source.

A. Daily SeaWorld Fireworks Displays Cannot Form the Basis of a NPDES Permit for a Single Event Fireworks Display

Lacking any substantive scientific evidence to support its regulatory grab, the Regional Board appears to have inappropriately based the requirements and procedures of the Tentative Order on the wholly irrelevant ongoing fireworks displays that occur at SeaWorld. As noted above, the SeaWorld fireworks shows occur for over 100 consecutive days per year, and are shot from a barge in a shallow, enclosed bay. In fact, the Tentative Order itself directly acknowledges the unique circumstances of the SeaWorld events stating, “SeaWorld’s public fireworks events represent the highest level of water and sediment effects because (1) Mission Bay is unique due to the restricted circulation of waters within the bay [and] the shallow depth of the bay in the vicinity of the fireworks events, and 2) the high frequency of repeat fireworks events throughout the year at the same location results in maximum pollutant loading.”

In stark contrast to the SeaWorld shows, the Fourth of July fireworks displays in La Jolla and communities around San Diego occur on a single day, last 15-25 minutes, and are often shot in proximity to the open ocean, a body of water that has a significantly different tidal structure which quickly dissipates any combusted residue that might enter the water. Applying the SeaWorld monitoring data to occasional Fourth of July fireworks displays results in an inappropriate “apples to oranges” regulatory comparison and illustrates why the Tentative Order cannot stand as currently drafted.

Even assuming the SeaWorld water chemistry data could be applied to significantly less frequent fireworks displays in proximity to entirely different bodies of water, such data demonstrates that these displays should be treated as a de minimis source. The Tentative Order itself acknowledges that after over 100 consecutive days of fireworks and three years of testing, “[w]ith the exception of Zinc, bis (2-ethylhexyl) phthalate, and perchlorate, 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. Comparison of the average concentrations of all the metals in water samples to California Toxics Rule (CTR) saltwater criteria shows that concentrations fall below both continuous exposure and maximum exposure concentrations.” Tentative Order, at 7.

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Given that most regional coastal fireworks displays occur only once or twice per year and would therefore demonstrate even lower levels of contaminants, if any, the SeaWorld data supports a finding that these fireworks displays are a de minimis source, which are not likely to cause or have a reasonable potential to cause or contribute to an adverse impact on the beneficial uses of receiving waters.

B. 2010 Big Bay Boom Monitoring Demonstrates No Water Quality Impact

In an obviously more comparable situation, yet still far bigger than the typical community fireworks show, recent monitoring data from the July 2010 Big Bay Boom also confirms that annual fireworks displays result in little to no environmental impact to surrounding bodies of water. The Big Bay Boom is a once-a-year Fourth of July fireworks display that occurs around the north bay area of San Diego Bay. A recent monitoring report for the Big Bay Boom notes that, "We have reviewed the data and found that the vast majority of metals analysis results indicated that total concentrations either declined between the pre-fireworks and post-fireworks sampling events, or increased less than 10 percent (an arbitrary value)." Yet the Tentative Order makes no mention of this data and instead only relies on the inapplicable results of SeaWorld's water quality and sediment chemistry monitoring.

With the preponderance of the evidence showing that there are no discernable water quality impacts related to once- or twice-yearly fireworks events, the Regional Board should revise the Tentative Order to implement a de minimis exception for those fireworks displays that occur on the order of four to ten times a year or otherwise meet a measurable size threshold.

IV. THE TENTATIVE ORDER'S MONITORING REQUIREMENTS ARE DISPROPORTIONATE TO WATER QUALITY IMPACTS AND THEREFORE VIOLATE MANDATORY COST-BENEFIT ANALYSES

California Water Code section 13267(b)(1) provides:

The burden, including costs, of [monitoring program] reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports.

As stated above, local water quality consultants have estimated that the water quality and sediment monitoring required by the terms of the Tentative Order will cost between \$30,000 and \$100,000. Yet the Regional Board has failed to support this enormous financial burden with any scientific data or information that demonstrates the need for the report. In fact, as shown above, all available information in the record supports a finding that there are no discernable water quality impacts related to occasional public fireworks displays. Therefore, the Tentative Order is in direct violation of California Water Code section 13267(b)(1), as no reasonable relationship can be shown between the outrageous costs of the Tentative Order's water quality and sediment monitoring requirements and any impact on water quality. Indeed, the monitoring costs equal or *exceed* the costs of the entire fireworks displays.

Notably, the U.S. Supreme Court recently confirmed that it is proper to compare costs and benefits when applying the CWA where the benefits are significantly disproportionate to the

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costs, especially when the benefits are de minimis, as here. *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1510 (2009).

V. THE TENTATIVE ORDER MAY REQUIRE INDIVIDUAL COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT FOR EACH PUBLIC FIREWORKS DISPLAY

Adding to the list of significant permitting costs and unintended consequences, each organization hoping to produce a future public fireworks display may be required to comply with the California Environmental Quality Act (Cal. Pub. Res. Code § 21000, *et seq.*) (“CEQA”) if the Tentative Order is approved as it currently stands. While the Tentative Order makes clear that the Regional Board’s approval of the General Permit would be exempt under CEQA pursuant to California Water Code section 13389, it is unclear under the terms of the Tentative Order whether the Regional Board’s act of reviewing and issuing each individual fireworks permit contemplated under the General Permit would be deemed a “discretionary act” subject to CEQA. Cal. Pub. Res. Code § 21080(a). If so, each time an entity seeks a fireworks permit from the Regional Board, that entity or even the Regional Board itself may be required to prepare CEQA environmental documents such as an initial study, environmental impact report and/or negative declaration. The costs of preparing such environmental analyses can reach as much as several hundred thousand dollars, dwarfing the current budgets of community fireworks presentations and making the prospect of future fireworks display even more unrealistic.

This CEQA scenario is not far-fetched; it is the exact position taken by the Coastal Environmental Rights Foundation (“CERF”) in the recent state court litigation filed in 2010 against the La Jolla fireworks display. There, CERF asserted in court pleadings that the City of San Diego’s permitting decision for the 2010 La Jolla community Fourth of July fireworks display was a discretionary project subject to CEQA because “it is a project requiring the exercise of judgment or deliberation by the City prior to Project approval.” If the Regional Board agrees with this radical interpretation of CEQA, does the Regional Board plan to act as the lead or responsible agency under CEQA for all fireworks shows in San Diego County, including, but not limited to, the Fourth of July, New Years Eve, the Summer Pops concert series, Humphreys Concerts By the Bay, and the San Diego Bay Parade of Lights? Such an unprecedented increase in regulatory responsibility would no doubt require significant time, effort and resources on the part of the Regional Board staff, in addition to those additional tasks already contemplated in the Tentative Order.⁴

⁴ We further note that the Tentative Order appears to encroach on several other regulatory jurisdictions, thereby creating additional and unnecessary regulatory responsibilities for the Regional Board and its staff. As currently drafted, the Tentative Order requires documentary proof of United States Coast Guard Marine Event Permits, State Fire Marshal’s licenses and city permitting “[n]o later than 30 days in advance of any planned public display of fireworks.” Tentative Order at E-5. This begs the question of why the Regional Board would set itself up as the regulatory and permitting clearinghouse for these events. By doing so, the Regional Board is assuming an oversight role of state fire

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The public is entitled to understand the extent to which CEQA would apply to regional fireworks displays, and how the Regional Board plans to manage this potentially substantial increase in regulatory workload, including how such CEQA compliance would impact the Regional Board's ability to timely issue annual fireworks permits. Under the terms of the Tentative Order as it now stands, these important issues have been entirely unaddressed.

VI. THE TENTATIVE ORDER WILL RESULT IN HARMFUL UNINTENDED CONSEQUENCES

In addition to the cancellation of most long-standing fireworks celebrations, the Tentative Order will lead to several harmful indirect effects on the surrounding San Diego region, as described below.

A. The Tentative Order Will Lead To Increased Public Safety Risk

Preventing professionally conducted public coastal fireworks displays would likely inevitably result in an increase in untrained individuals seeking to set off their own private fireworks displays, which implicates important public safety concerns. The Chief of the City of San Diego Fire Department ("SDFD"), Javier Maniar, spoke to this very issue in a recent declaration made in connection with the litigation filed against the La Jolla fireworks display. Chief Maniar stated:

The SDFD favors public Fourth of July fireworks displays that are produced by professional pyrotechnic companies and permitted by the City, such as the La Jolla fireworks; professionally managed fireworks are more beneficial to the community than private fireworks because they reduce the incidents of injuries and accidental fires. I know from my experience and training that private fireworks set off by minors and untrained individuals injure thousands of people in the United States each year.

Moreover, current statistics confirm that private fireworks result in significant numbers of injuries and substantial property damage each year. According to the U.S. Consumer Product Safety Commission, roughly 7,000 people were treated in hospital emergency rooms for injuries associated with fireworks in 2008.⁵ The National Fire Protection Association estimates that fireworks in 2008 nationally caused an estimated 22,500 reported fires, including 1,400 structure

officials, the U.S. Coast Guard and municipal land use planning. This authority grab is outside of the area of expertise of the Regional Board and goes well beyond the defined role of the Board and purpose of general NPDES permits.

In addition, the Regional Board chronology for annual submissions in support of the General Permit is not consistent with the schedule of how these local and federal agencies will actually respond to fireworks permitting requests, which may be only a week or two before the event.

⁵ This information can be found at <http://www.cpsc.gov/cpsc/pub/pubs/012.html>.

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fires, 500 vehicle fires and 20,600 outside and other fires.⁶ These fires resulted in one civilian death, 40 civilian injuries and \$42 million in direct property damage. In addition, private fireworks can lead to an increased risk of wildfires, a serious issue well known to all residents of the San Diego region. Importantly, Chief Maniar noted that “[t]he risk of wildfires from fireworks is significantly increased with unauthorized, unsupervised private fireworks displays.” The City of Temecula thus sums it up perfectly: “The safest way to enjoy fireworks is to attend a public display conducted by trained professionals.”⁷

B. The Tentative Order Will Cause Economic Harm to Businesses that Rely on These Events

Furthermore, the cancellation of the regional public fireworks displays will result in significant economic harm to the many small businesses in each community that rely on these yearly events to support their establishments. For example, in La Jolla, hotel rooms overlooking the ocean and restaurants with a view of the fireworks are booked months in advance of the Fourth of July Fireworks and represent a significant economic event for these businesses. Thousands of people come to the village of La Jolla to watch the fireworks and spend the day shopping and patronizing local restaurants. As noted by the San Diego Lodging Industry Association in their letter to Mayor Sanders, “Without question, the loss of Fourth of July fireworks displays will result in a loss of visitors to those communities that must cancel them. Tourists have a multitude of choices and can easily and quickly alter travel plans... Visitors who would have filled hotel rooms in La Jolla will find an alternate location that fits their needs. In this case, La Jolla’s (and the City of San Diego’s) loss will be Oceanside’s, Coronado’s, or perhaps Palm Springs’ gain.”

This sentiment was reiterated by San Diego City Councilmembers Sherri Lightner and Kevin Faulconer in their declarations made in connection with the litigation filed against the La Jolla fireworks display. Both Councilmembers estimated that the La Jolla fireworks display attracts 13,000 to 20,000 spectators at various La Jolla venues and supports many La Jolla businesses. The loss of these important economic events to the San Diego region would likely have a significant impact on the ability of many small business to continue to remain profitable, especially in light of the recent economic downturn.

C. The Tentative Order Threatens Free Speech Rights

There are significant free speech issues associated with Fourth of July fireworks displays which the terms of the Tentative Order either ignore or dismiss. In their declarations filed with the court in the La Jolla litigation, San Diego City Councilmembers Kevin Faulconer and Sherri Lightner both noted the importance of Fourth of July fireworks to the civic fabric of their communities. Likewise, John Adams wrote to his wife Abigail after the signing of the

⁶ This information can be found at <http://www.nfpa.org/assets/files/pdf/os.fireworks.pdf>.

⁷ This information can be found at <http://www.cityoftemecula.org/Temecula/Residents/PublicSafety/fireworkssafety.htm>.

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Declaration of Independence on July 4, 1776 that this day “ought to be solemnized with pomp and parade, with shows, games, sports, guns, bells, bonfires, and illuminations, from one end of this continent to the other, from this time forward forever more.” Fourth of July celebrations are a form of free speech that cannot be suppressed by the Regional Board here.

It is not subject to dispute that Fourth of July fireworks are the fulfillment of these festivities and are deeply ingrained into the fabric of the entire nation as an important declaration of our collective freedoms. The burdensome regulations of this Tentative Order threaten those basic freedoms.

D. The Tentative Order Invites Additional Third-Party Litigation

The complexity of the issues presented by the Tentative Order and unsupported, yet definitive, statements in the Tentative Order that, for example, fireworks debris constitute “waste” make third-party litigation over compliance with the Tentative Order highly inevitable. If the Tentative Order is approved, local community groups and municipalities will be required to fight, one by one, with regards to whether or not they have complied with the terms of the Tentative Order. This litigation is likely to be extremely costly and would further erode the ability of these agencies and groups to produce future community fireworks events.

We also note that the Tentative Order would now require that any fireworks displays must “be located a sufficient distance” away from those areas designated by the State Water Resources Control Board as Areas of Special Biological Significance (“ASBS”). Tentative Order, at IV.C. In light of the recent litigation filed against our client, this requirement appears to be directed specifically at the La Jolla community fireworks display. But Scripps Park-based fireworks fall well outside of ASBS 29 (one-quarter to one-half mile), and are thus now “located a sufficient distance away.” Any Tentative Order would need to make an explicit factual finding (with sufficient evidentiary support) that certain fireworks displays like the Scripps Park fireworks are exempt from this requirement. Otherwise, imprecise and unclear measurements such as “sufficient distance” will only provide litigation fodder for opponents to litigate the La Jolla community display out of existence.

The evidence shows that there are no demonstrable water quality issues associated with occasional public displays of fireworks, yet the proposed Tentative Order will likely enhance the litigation position of opponents of public fireworks displays by providing a platform for citizen lawsuits and force many celebratory displays to be cancelled by regional communities who are wary of risking a costly lawsuit.

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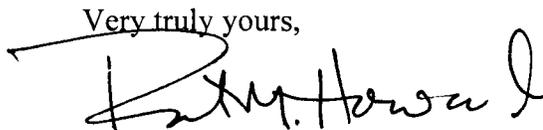
VII. CONCLUSION

In sum, the Tentative Order is a direct threat to Fourth of July community celebrations and other regional fireworks displays. The burdensome monitoring and reporting requirements will drive up overall costs such that most, if not all, local community displays will likely be cancelled. Further, the Regional Board lacks the statutory authority to regulate this activity as a "point source" discharge under the CWA, and all available scientific data supports a finding that occasional fireworks events should be treated as a de minimis source.

We therefore request that the Regional Board withdraw this Tentative Order, or alternatively issue a General NPDES permit exemption for public fireworks displays that occur from the same coastal location between four to ten times a year and/or fall below a reasonable and substantially defensible threshold for the volume of pyrotechnic material to be detonated.

Please feel free to contact me at (619) 236-1234 if you have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert M. Howard". The signature is written in a cursive style with a large, sweeping initial "R".

Robert M. Howard
of LATHAM & WATKINS LLP