

December 9, 2010

VIA EMAIL AND U.S. MAIL

Michelle Mata
California Regional Water Quality Control Board
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**Re: Tentative Order No. R9-2010-0124, General Permit No. CAG999002
General Waste Discharge Requirements for the Public Display of
Fireworks**

Topics of Discussion for December 16, 2010 Public Workshop

Dear Ms. Mata:

We represent Pyro Spectaculars, Inc. ("PSI"). PSI is a family-owned fireworks display company that creates and sells fireworks shows to public, private and non-profit customers around the country, including in the San Diego Region. Representatives of PSI will attend the December 16, 2010 Public Workshop ("Workshop") regarding Tentative Order No. R9-2010-0124 (the "Tentative Order"). The purpose of this letter is to provide the Regional Board and its staff with some of the topics that should be discussed at the Workshop. PSI requests that one of its representatives have the opportunity to speak at the Workshop. PSI looks forward to a productive discussion.

Before setting forth the individual topics, it is important to focus on big picture ramifications of the Tentative Order. The Tentative Order will create a permit process for annual fireworks display shows that does not exist anywhere else in California or the United States. The application process, consultant workplans, repeated water and benthic sampling requirements and consultant reporting that appear to be required by the Tentative Order for each fireworks display show over water will so dramatically increase the costs that the shows will not take place. While no doubt an unintended consequence of the Tentative Order, the traditional public 4th of July celebrations in the San Diego Region, enjoyed by hundreds of thousands of residents, will no longer take place. This issue has been addressed in numerous comment letters already submitted to the Regional Board.

We now turn to some of the specific issues that PSI wants to discuss at the Workshop.

I. LEGAL BASIS FOR ISSUING WDRS FOR FIREWORKS DISPLAYS

We would like to spend some time during the Workshop discussing the Regional Board's legal basis for issuing Waste Discharge Requirements ("WDRs") for fireworks displays as proposed in the Tentative Order. PSI, as well as the fireworks industry trade organizations, does not think that the Regional Board has the legal authority to regulate fireworks displays through the issuance of WDRs. No similar permit has been required anywhere else in California or the United States.

The federal Clean Water Act's National Pollutant Discharge Elimination System and the California WDR requirements are applicable only to "point sources" of pollution. City of Arcadia, et al. v. State Water Resources Control Board, 135 Cal.App.4th 1392, 1404-05 (2006). "Point Source" is defined as "any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged." 33 U.S.C. 1362; Cal. Water Code § 13373. Fireworks displays are not "discernible, confined and discrete conveyances" for the discharge of pollutants to navigable waters. Fireworks displays are seasonal entertainment events where pyrotechnics are launched into the air from a mortar. Fireworks, not "pollutants," are shot out of the mortars.

The legislative history of the Clean Water Act suggests that Congress meant only to cover discharges that were at least "frequent," or that resulted in some "measurable" waste entering the water. NW. Env'tl. Def. Ctr. v. Brown, 617 F.3d 1176, 1183 (9th Cir. 2010). 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 643, 646 (2d Cir. 1993) (emphasis added). Seasonal fireworks displays, however, take place only once or twice per year and are not an industrial source of "pollutants." The evidence shows that occasional public fireworks displays are not "frequent" nor do they result in any "measurable" amount of material entering the water. Any small amount of debris that may fall to the water surface is incidental to the primary entertainment purpose of the show. Incidental discharges from airborne deposition have been considered "non-point discharges" under the Clean Water Act. For these reasons, there is no legal basis for the issuance of the WDRs in the Tentative Order.

II. THERE IS NO SCIENTIFIC BASIS FOR ISSUING WDRS

PSI requests that the Regional Board explain the scientific basis for its decision to regulate fireworks displays within the San Diego Region through the issuance of WDRs. The Regional Board's decisions must be based on science, not speculation or

fear of litigation. The data from the sampling by SeaWorld clearly demonstrates that no significant impact to water quality is associated with the vast number of fireworks shows (80 or more shows) put on by SeaWorld each year. The data is compelling when one considers the unique features of Mission Bay that are unlike most other waterbodies in the San Diego Region. This point is recognized by the Regional Board in the Tentative Order: "SeaWorld's public fireworks events represent the highest level of water and sediment effects because ... 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." (Tentative Order, p. 7.) According to the terms of the Tentative Order, both the Regional Board and the United States EPA have classified fireworks displays as very minor discharges. (Tentative Order, p. 1, Table 1.) Further, the Tentative Order states that "the threat to water quality and complexity of the discharge is determined to be category 3C" under Title 23, Section 2200 of the California Administrative Code. Category 3C is the lowest possible threat discharge. There is no scientific basis here to support issuance of the Tentative Order. At a minimum, the proposed water quality and benthic sampling requirements, which are substantial and extremely expensive, should be eliminated.

III. ANY DISCHARGE FROM FIREWORKS DISPLAYS IS *DE MINIMIS*

State law defines a *de minimis* discharge 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 under an NPDES permit." 23 Cal. Code of Regs. § 2200, n. 15. While we believe that the Regional Board lacks legal authority to regulate fireworks displays in the first instance, if the Regional Board continues to take a contrary position it should exercise its discretion and, based on science and the available sampling data, make a finding that fireworks displays are a *de minimis* discharge that requires no permit.

IV. WAIVERS UNDER SECTION 13269 OF THE WATER CODE

Section 13269 of the Cal. Water Code allows the Regional Board to waive WDRs as to a specific discharge or type or discharge – in this case, fireworks displays over water – if two criteria are met: (1) the Regional Board determines that the waiver is consistent with applicable state or regional water quality control plans; and, (2) the waiver is in the public interest. Both of these criteria are met. In addition, because the SeaWorld and other available sampling data shows that the proposed discharges do not pose a significant threat to water quality, the Regional Board should waive the monitoring requirement. Cal. Water Code § 13269(a)(3). If the Regional Board ultimately decides to regulate this issue, it should include a clear, easy to use, and inexpensive conditional waiver process.

V. ECONOMIC CONSIDERATIONS MUST BE TAKEN INTO ACCOUNT

The Regional Board is required by law to consider both the economic and social impacts of its actions including the issuance of WDRs. Cal. Water Code §§ 13000, 13241 and 13263(a). The United States Supreme Court confirmed that it is proper to compare costs and benefits when applying the Clean Water Act in situations where the benefits are significantly disproportionate to the costs - especially when the benefits are *de minimis*, as here. Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1510 (2009).

The sponsors of the vast majority of fireworks displays in the San Diego Region are cities, towns and small non-profit organizations. These fireworks shows are not typically a source of revenue to the sponsor and are generally held to express patriotism, celebrate individual and group accomplishments and to benefit charitable organizations and local small businesses. Most Independence Day committees, non-profit organizations and community groups have neither the expertise to comply with the technical requirements of the Tentative Order nor the financial resources to fund the substantial increases in their costs if it is adopted.

There is social value to these fireworks displays. They provide a form of free entertainment to the community, which is desperately needed in these tough economic times. Fireworks shows attract tourists and draw patrons to local hotels, restaurants and other establishments. The unique relationship between the greater San Diego area and the U.S. military makes the region a great place to hold fireworks displays.

If the Tentative Order is adopted, the cities, towns and small non-profit organizations that sponsor the vast majority of fireworks displays in the San Diego Region will be subject to substantial and costly monitoring and reporting requirements. It has been estimated that the cost to comply with just the monitoring and reporting requirements for a single fireworks display could reach into the six figure range – multiples of what it costs to actually put on the average fireworks display. The likely result is the end of public 4th of July fireworks celebrations.

These substantial costs clearly outweigh any benefit to water quality or the environment that may come by the Regional Board's adoption of the Tentative Order. These displays have already been categorized by the Regional Board as a very low threat discharge.

VI. THE TENTATIVE ORDER THREATENS THE RIGHTS OF CITIZENS TO DEMONSTRATE THEIR PATRIOTISM

The rights of the citizens in the San Diego area to demonstrate their patriotism on Independence Day and to respect our country's Founding Fathers, who pledged their lives, their fortunes and their honor to fight for the very freedoms at issue here, are

matters of Constitutional dimension, of free speech and of the right to peaceably assemble. These are matters of national tradition that necessarily include and revolve around 4th of July fireworks displays. No less are the rights of these same citizens to express themselves through the arts, such as in presentations by the symphony and in other public celebrations and tributes throughout the year.

The application of the Tentative Order to these citizens will result in the elimination of most, if not all, of their fireworks displays, including annual 4th of July fireworks shows in the San Diego area. This result will greatly impair the rights of these San Diego citizens, while leaving other citizens of California and the rest of the country free to express their patriotism and artistic views without such extraordinary financial, technical or logistical burdens.

The Tentative Order, if made final, would also end the availability of a safe public venue for citizens to peaceably assemble in the spirit of community. It would impair their rights to express themselves through the arts, and virtually extinguish their ability to celebrate our nation's most patriotic holiday, Independence Day, in their own communities and in the manner envisioned by our forefathers at the inception of this great country. The harshest consequences of adoption of the Tentative Order will fall upon those of lesser financial means.

PSI appreciates the opportunity to discuss these and other issues with Regional Board staff and the other interested parties at the December 16, 2010 Workshop.

Very truly yours,
Hunsucker Goodstein & Nelson PC


Brian L. Zagon

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