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April 20, 2011

VIA ELECTRONIC AND U.S. MAIL

Hon. 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: Draft General NPDES Permit No. CAG999002 for the Public Displays of Fireworks

Dear Mr. Gibson and Honorable Board Members:

Thank you for the opportunity to comment on the final draft Tentative Order No. R9-2011-0022, NPDES No. CAG999002 ("Tentative Order"). 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 of a public fireworks display located at Scripps Park.

As stated in our December 9, 2010 and March 7, 2011 letters, and as we outlined at the December 16, 2010 and March 11, 2011 workshops on this 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. We do not believe that there is sufficient precedent rooted in federal case law or any provision in the Clean Water Act ("CWA") that would categorize fireworks displays as a "point source" discharge. Therefore, as a jurisdictional matter, fireworks displays (whether coastal, near-coastal, or inland) cannot be regulated by the Regional Board under the NPDES program.

It is important to note that neither the EPA, the State Board, nor any other Regional Board in California has concluded that fireworks constitute a "point source" discharge. We find it unsettling that the San Diego Regional Board seeks to regulate what no other government authority has attempted to regulate since the inception of the NPDES permitting program in 1972. The rationalization that SeaWorld voluntarily agreed to submit to a NPDES permit in order to resolve a prior dispute (and EPA did not stand in the way of this voluntary permitting) side steps the core legal issue. We continue to question the Regional Board's statutory authority to sweep within its regulatory jurisdiction once-per-year shows, especially where the Regional Board has not shown that the activity to be regulated is a "point source"

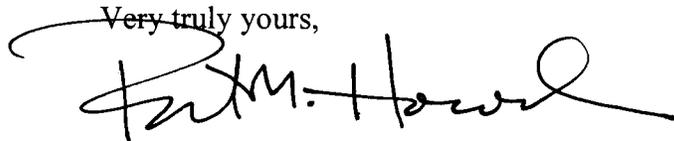
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under the CWA and, in fact, acknowledges in the Tentative Order that these activities “pose no significant threat to water quality.”¹

Without waiving any rights to dispute the limits of the Regional Board’s regulatory authority, we believe that the draft Tentative Order makes thoughtful and sensible technical findings based upon the available science. We agree that the scientific evidence supports the conclusion that fireworks displays over water “pose no significant threat to 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 LJCFF believes that the Special Provisions of the Tentative Order at Section VII.C.2 (pages 24-25) related to the Ocean Plan and allowable discharges to the La Jolla Area of Special Biological Significance (“ASBS”) are also reasonable approaches that are well supported by the science.

Although we continue to dispute the Regional Board’s categorization of fireworks as a CWA “point source” discharge, the Staff has no doubt been thoughtful and responsive to our comments, which we sincerely appreciate. We believe that the Staff has rigorously evaluated the technical issues (though not the legal issues) and worked hard to strike a better balance than the original draft Tentative Order. Thank you for your consideration of LJCFF’s comments.

Very truly yours,



Robert M. Howard
of LATHAM & WATKINS LLP

Attachments

cc: Deborah Marengo
Adam Harris

¹ Tentative Order at 8.

² Tentative Order at 8

³ Tentative Order at 26

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 residual firework pollutant waste starting on the date specified in the NOE. General Permit coverage will be effective when all of the following have occurred:

1. The Discharger has submitted a complete permit application;
2. The Fireworks Best Management Practices Plan has been accepted by the San Diego Water Board; and
3. The San Diego Water Board has issued a Notice of Enrollment (NOE).

E. Notice of Exclusion (NOEX)

The San Diego Water Board may issue a Notice of Exclusion (NOEX), which either terminates the permit coverage or requires submittal of an application for an individual permit. An NOEX is a one-page notice that indicates that the proposed Discharger is not eligible for coverage under this General Permit and states the reason why. This justification can include, but is not limited to, necessity to comply with a total maximum daily load or to protect sensitive water bodies.

F. Fees

Under this General Permit, fireworks discharges require no treatment systems to meet the terms and conditions of this Order and pose no significant threat to water quality. As such, they are eligible for Category 3 in section 2200(b) (8) of Title 23, California Code of Regulations (CCR). This category is appropriate because regulation of firework discharge under this Order incorporates best management practices (BMPs) to control potential adverse effects to beneficial uses, and this General Permit prohibits residual firework pollutant waste from causing excursions of water quality objectives. The annual fee associated with this rating can be found in section 2200(b) (8) of Title 23, CCR, which is available at <http://www.waterboards.ca.gov/resources/fees/>.

- q. In addition to any other grounds specified herein, this Order or a Notice of Enrollment from the San Diego Water Board shall be modified or revoked at any time if, on the basis of any data, the San Diego Water Board determines that continued discharges may cause unreasonable degradation of the aquatic environment.
- r. The San Diego Water Board or the Director of the USEPA may require any person requesting enrollment under this Order or subject to waste discharge requirements under this Order to apply for and obtain an individual NPDES permit. Cases where an individual NPDES permit may be required include but are not limited to those described in 40 CFR 122.28 (b) (3).
- s. It shall not be a defense for the enrollee in an enforcement action that effluent limitation violations are a result of analytical variability rendering the results inaccurate. The validity of the testing results, whether or not the enrollee has monitored or sampled more frequently than required by this Order, shall not be a defense to an enforcement action.
- t. The Discharger shall take all reasonable steps to minimize or prevent any discharge in violation of this Order which has a reasonable likelihood of adversely affecting human health or the environment.
- u. For the purposes of this Order, the term permit, general permit, and WDR, shall have the same meaning as the term Order used elsewhere in this Order.

B. Monitoring and Reporting Program (MRP) Requirements

The Discharger shall comply with the MRP and future revisions thereto in Attachment E of this Order.

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 into the Pacific Ocean offshore of Scripps

Park approximately one-quarter mile south from 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 conditions⁵ in the ASBS receiving waters. Temporary excursions from natural ocean water quality 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.

3. Special Provisions for SeaWorld San Diego Discharges

- a. The October 15, 2009 Report of Waste Discharge submitted by Sea World Inc. is deemed complete for the purpose of enrollment under this Order. The enrollment date will be effective upon the effective date of this Order and SeaWorld San Diego is authorized to discharge residual firework pollutant waste starting on this date pursuant to the requirements of this Order. The requirements of this Order will supersede the requirements of SeaWorld San Diego's Order No. R9-2005-0091, NPDES No. CA0107336, for residual firework pollutant waste discharges upon the effective date of this Order.
- b. SeaWorld San Diego shall submit the filing fee for coverage under this Order, specified in Section II.F of this Order, no later than June 1, 2011.
- c. SeaWorld San Diego shall prepare and submit a Fireworks Best Management Practices Plan containing the information specified in

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.

Section V.B. of this Order no later than September 1, 2011.

- 4. Special Studies, Technical Reports and Additional Monitoring Requirements – Not Applicable**
- 5. Construction, Operation and Maintenance Specifications- Not Applicable**
- 6. Special Provisions for Municipal Facilities (POTWs Only) – Not Applicable**
- 7. Other Special Provisions – Not Applicable**
- 8. Compliance Schedules – Not Applicable**

VIII. COMPLIANCE DETERMINATION

This Order requires the use of minimum stipulated BMPs to control and abate the discharge of pollutant wastes from public fireworks events to surface waters in the San Diego Region. Proper implementation of the BMPs will assure the protection of water and sediment quality within the receiving waters. Dischargers enrolled under this Order are expected to comply with all water and sediment quality objectives through the implementation of BMPs. Compliance will be determined by evaluating the proper implementation of the minimum stipulated BMPs and their effectiveness in preventing and minimizing pollutant waste loading from public fireworks events to surface waters. Compliance will also be evaluated using information obtained under the monitoring and reporting program of this Order.]