

## I. San Diego Coastkeeper's Position

San Diego Coastkeeper understands that fireworks displays are a time honored tradition often used to celebrate such holidays as New Year Eve and the Fourth of July. San Diego Coastkeeper does not want to see fireworks displays end but rather wants to ensure that displays are not a danger to water quality by requiring that they are conducted in appropriate areas and in a manner consistent with existing laws.<sup>1</sup> San Diego Coastkeeper supports a permitting process for all fireworks displays which occur over, or adjacent to, surface waters. Such a permit must cover small and large displays in all locations whether they are used once or multiple times a year. A robust water quality monitoring program is also crucial to a useful permit and will provide data to quantify the effects fireworks shows have on our environment. Our goal is to see the tradition of fireworks shows continue in a responsible way which will not pollute our regional waters.

### Background

Fireworks displays over water pose a threat to water quality. The explosives and chemicals that produce the percussions, beautiful lights and colors, rain down on the water after the shells explode. Fireworks typically contain such chemicals as aluminum, magnesium, strontium, barium, sodium, potassium, iron, copper, sulfate, nitrate and perchlorate<sup>2</sup>. Some of these chemicals pose serious risks to human health and wildlife.<sup>3</sup> Further, the cardboard casings, fuses and wires that comprise the fireworks fall into the water as trash after the munitions explode.<sup>4</sup> A relatively small fireworks display lasting five to six minutes, and comprising approximately 250 shells, produces an average of at least nineteen pounds of wet trash.<sup>5</sup> Fireworks which fail to explode in the air also land in the water.<sup>6</sup>

<sup>1</sup> Areas that would not be considered appropriate include, but are not limited to, ecologically sensitive areas such as Areas of Special Biological Significance (ASBS), ecological preserves, or sensitive nesting locations.

<sup>2</sup> California Regional Water Quality Control Board San Diego Region Addendum No. 1 to Order No. R9-2005-0091, NPDES No CA0107336 for the Discharge of Waste from Sea World Areal Fireworks Displays to San Diego Mission Bay San Diego.

<sup>3</sup> See, e.g., N. Irving Sax & Richard J. Lewis, Sr., DANGEROUS PROPERTIES OF INDUSTRIAL MATERIALS (Van Nostrand Reinhold, New York, 1989, 7th ed.; Richard T. Wilkin, Dennis D. Fine, and Nicole G. Burnett, *Perchlorate Behaviour in a Municipal Lake Following Fireworks Displays*, 41 Environmental Science & Technology, 2007, at 3966.

<sup>4</sup> Supra Note 1

<sup>5</sup> Id.

<sup>6</sup> Id.

When there is a potential discharge of pollutants into waters of the United States, the Clean Water Act requires a National Pollution Discharge Elimination System (NPDES) permit to be obtained by the discharger.<sup>7</sup> The term ‘waters of the United States’ is used to describe most surface waters within the United States, including but not limited to any waterway used for navigation, rivers, streams, wetlands and waters affected by the tide.<sup>8</sup> Our coastal surface waters are considered waters of the United States. Due to the fact that fireworks displays occurring over or adjacent to surface water release harmful pollutants into those surface waters, from a discrete and discernable location, the displays are subject to NPDES permits.<sup>9</sup>

## II. History of Fireworks legal challenges in San Diego

In December 2007, the California Water Quality Control Board, San Diego Region issued Anheuser-Busch Inc., owners of SeaWorld San Diego, a first of its kind NPDES permit regulating the discharge of pollutants from fireworks into Mission Bay. The permit was issued after San Diego Coastkeeper sent notice of the unpermitted discharges (more than 150 displays a year). The permit acknowledges that pollutants released by fireworks adversely impact Mission Bay and requires continued water quality and sediment monitoring within the Bay.<sup>10</sup> Monitoring results have shown elevated concentrations of zinc and perchlorate in the water column, and barium, chromium, cobalt, copper, and titanium in elevated concentrations in the sediment. Toxicity has varied widely and benthic community structure, an indicator of overall ecosystem health, has been inconclusive.

Less frequent shows have also been targeted as unpermitted discharges. In 2009 the Port of San Diego cancelled its ‘Big Bay Boom’ show out of fear of litigation, although no lawsuit was ever filed.<sup>11</sup>

In 2010, environmental group Coastal Environmental Rights Foundation (CERF) sued the City of San Diego to enforce permit requirements for a fireworks display occurring over La Jolla Cove, an underwater Ecological Reserve and Area of Special Biological Significance (ASBS). Despite

<sup>7</sup> See 33 U.S.C. § 1311(a); 33 U.S. C § 1342

<sup>8</sup> See 40 C.F.R. §230.3(s)

<sup>9</sup> CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD SAN DIEGO REGION, EXECUTIVE OFFICER’S REPORT, June 9, 2010 at 16.

<sup>10</sup> See *Infra*. Note 1

<sup>11</sup> See Steve Schmidt, *Legal Threat ends San Diego Bay Fireworks Show*, SAN DIEGO UNION TRIBUNE, December 23, 2010, accessed July 29, 2010 at <http://www.signonsandiego.com/news/2009/dec/23/fireworks-show-canceled-over-threat-legal-action/>; Logan Jenkins, *Group on Firing Line Against Coastal Fireworks Shows*, SAN DIEGO UNION TRIBUNE, December 28, 2010, accessed July 29, 2010 at <http://www.signonsandiego.com/news/2009/dec/28/group-firing-line-against-coastal-fireworks-shows/>

demonstrating the potential to discharge pollutants into an ecologically sensitive area, the Superior Court Judge hearing the case denied the request for a Temporary Restraining Order and the show was performed.<sup>12</sup>

The California Water Quality Control Board San Diego Region is currently drafting a National Pollution Discharge Elimination System general permit which will regulate all firework discharges into surface waters within the San Diego Region.<sup>13</sup> The Regional Board expects the general permit will be adopted in the first half of 2011.<sup>14</sup> Once adopted, all fireworks displays which pose the potential to discharge pollutants into surface waters will be required to be covered by the permit.

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<sup>12</sup> See Mike Lee, *La Jolla Cove Fireworks Show Spared*, SAN DIEGO UNION TRIBUNE, June 30, 2010, accessed July 29, 2010 at <http://www.signonsandiego.com/news/2010/jun/30/la-jolla-cove-fireworks-show-spared/>

<sup>13</sup> See *Infra* Note 6 at 16

<sup>14</sup> *Id.*