

April 20, 2011

VIA EMAIL AND FAX

David Gibson
Executive Officer
California Regional Water Quality Control Board
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**Re: Comments of Pyro Spectaculars, Inc. to Tentative Order No. R9-2011-0022, Proposed NPDES Permit No. CAG999002 for the Public Display of Fireworks
Regional Board Meeting: May 11, 2011**

Dear Mr. Gibson:

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. PSI has submitted comments in response to both prior tentative orders and participated in the two workshops conducted by the Regional Board staff. While we fundamentally disagree on the Regional Board's authority to require a discharge permit in these circumstances, we and PSI very much appreciate the Regional Board's willingness to listen to and exchange ideas with representatives of the fireworks display companies, show sponsors and members of the San Diego community regarding the tentative orders. Most importantly, we and PSI appreciate the efforts of the Regional Board staff to balance the interests of environmental protection with the interests of the citizens in the San Diego Region in celebrating their patriotism with a traditional public 4th of July fireworks celebration.

Representatives of PSI will attend the May 11, 2011 Regional Board meeting at which Tentative Order No. R9-2011-0022 (the "Tentative Order") will be considered for adoption. The purpose of this letter is to provide the Regional Board with PSI's remaining comments to the Tentative Order. PSI also requests an opportunity to address the Regional Board during the May 11, 2011 meeting.

PSI is a fifth generation family company that has been performing public fireworks displays for more than three decades, including many displays in the San Diego area. The owners and employees of PSI have vast experience in the professional display of fireworks and perform hundreds of displays every year throughout California, the nation and the world.

PSI is committed to the highest possible levels of professional industry participation, and it regularly participates and assists in the development, maintenance and enforcement of state, national and international fireworks standards, laws and regulations. PSI employees provide many training sessions each year for its pyrotechnic operators. PSI works directly with the State Fire Marshal's office in the development and presentation of in-service training for hundreds of authorities with jurisdiction over fireworks displays and pyrotechnic special effects.

PSI's comments are generally divided into two main categories. First, PSI submits there is no legal or scientific basis for the Regional Board to require an NPDES permit for public fireworks shows. The Tentative Order will create a permit process for annual fireworks shows that does not exist anywhere else in California or the United States. Second, should the Tentative Order be adopted, based on its decades of experience selling and firing public fireworks display shows, PSI requests that certain time periods in the Tentative Order be modified. PSI does not think that modifying these time periods will negatively impact the permit process or the protections for the environment embodied in the Tentative Order.

I. GENERAL COMMENT 1

A. THERE IS NO LEGAL BASIS FOR THE REGIONAL BOARD TO ADOPT THE TENTATIVE ORDER

In prior comment letters, PSI has set forth its position that the Regional Board lacks the legal authority to regulate fireworks shows pursuant to the federal Clean Water Act or the California Water Code. The Tentative Order will create a permit process for annual fireworks shows that does not exist anywhere else in California or the United States.

The federal Clean Water Act's NPDES 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 shows 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 shows that Congress intended only to cover discharges that were at least “frequent,” or that resulted in some “measurable” waste entering the water. NW. Envtl. 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 shows typically take place only once per year and are not an industrial source of “pollutants.” The evidence in the record before the Regional Board shows that occasional public fireworks shows 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 to regulate fireworks displays as proposed in the Tentative Order.

B. THERE IS NO SCIENTIFIC BASIS TO SUPPORT ISSUANCE OF THE TENTATIVE ORDER

PSI also does not believe that there is a scientific basis for the Regional Board’s decision to regulate fireworks displays within the San Diego Region. Data from the sampling by SeaWorld in Mission Bay 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 over Mission Bay 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.

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. Further, the Tentative Order states that “the threat to water quality and complexity of the discharge is determined to be category 3C” (Tentative Order, p. 1, Table 1). Under Title 23, Section 2200 of the California Administrative Code, “category 3C” is the lowest possible threat discharge. Simply stated, there is no scientific basis here to support issuance of the Tentative Order.

II. GENERAL COMMENT 2

By letter dated March 7, 2011, Gary Brown, General Counsel of PSI, submitted comments focused on the Fireworks Best Management Practices Plan (BMPs) set forth in Section V., paragraph B of the prior proposed tentative order. PSI’s comments focused on the practical aspects of implementing the BMPs in a manner that is

consistent with the applicable rules, regulations, law and safe handling practices for public fireworks displays, while at the same time maintaining the level of environmental protection the BMPs were intended to provide. Revisions to the BMPs to achieve this purpose were discussed at length at the March 11, 2011 Regional Board workshop. The revised BMPs in the Tentative Order are consistent with the applicable rules, regulations, law and safe handling practices for public fireworks shows, while at the same time maintain the level of environmental protection the BMPs were intended to provide.

If the Tentative Order is adopted, PSI believes that it appears to provide a workable solution for the San Diego Region subject to the two exceptions set forth below.

A. THE TIME PERIOD TO SUBMIT AN APPLICATION FOR THE PERMIT

In Section II.C., (page 7) of the Tentative Order, for the period after June 10, 2011, a show sponsor (identified as a "Discharger") must submit an application for coverage under the general permit to the Regional Board at least 60 days before the event. Based on its decades of experience selling public fireworks display shows, many shows, including some in the San Diego Region, do not get booked until two weeks before the event. More and more frequently, the non-profit and municipal sponsors of annual 4th of July fireworks shows do not know if they will have enough money to have the show until the proverbial "last minute." Accordingly, PSI requests that the Tentative Order be modified to require that a show sponsor apply for an application at least 20 days before the event.

At the workshop on March 11, Regional Board staff expressed interest in how much notice is required to obtain other permits necessary for a public fireworks show. Other permitting authorities generally have shorter time periods than 60 days for applying for permits associated with public fireworks shows. California Health and Safety Code § 12643 requires application to the State Fire Marshall or local fire department at least 10 days before a public fireworks show. Title 19 of the California Administrative Code, Section 993.1 requires only 72 hours notice to the State Fire Marshall before a fireworks show on State owned or occupied property. Most local fire departments require 14 days notice, with some requiring a longer period of up to 30 days. We understand that the City of San Diego requires 14 days to obtain a special event permit.

In Section I.E.3 of its Fact Sheet (attachment F-19), the Regional Board states that the U.S. Coast Guard has a 135 day notice requirement for its permit. It has been PSI's experience that if a show is booked less than 135 days before an event for which a Coast Guard permit is required, the Coast Guard has worked with PSI to issue the

permit in time for the event, especially for events in areas that are well-known to the Coast Guard.

PSI recognizes that the Regional Board needs sufficient time to review the applications submitted by show sponsors and to provide notice of enrollment. Most applications for annual 4th of July shows will be submitted this year between May 11 and June 20, 2011. Given the lower number of applications anticipated after June 20, 2011 and the fact they will not all be submitted within the same 30 day period, submission of applications after June 20, 2011 at least 20 days before the event (instead of 60 days) should be a workable time period. Accordingly, PSI requests that the Tentative Order be modified to require submission of the permit application at least 20 days before the event.

B. FIREWORKS POST EVENT REPORT

The Tentative Order now requires that the Fireworks Post Event Report be completed within 10 days after the event and, for shows conducted on the 4th of July, the report be submitted to the Regional Board by August 1. (Attachment C-1 and Section X.B.3, Table 2, at Attachment E-10.) PSI appreciates that the Regional Board has lengthened these time periods from the prior tentative orders. However, these periods are still not long enough given the vast numbers of shows conducted over the 4th of July fireworks season which can run from late June through mid-July.

Much of the information required to complete the Fireworks Post Event Report will be supplied by the fireworks display company. These companies, including PSI, annually supply hundreds of shows for the 4th of July season. Following the shows, all of the equipment is returned from the location of the show to PSI. There is a lot to do, including cleaning, refueling and returning hundreds of rented trucks, managing mountains of equipment and paperwork, completing payments, invoicing, and other accounting.

The operators for each show complete a pyrotechnic operator post display report and submit it to the State Fire Marshall within 10 days, a copy of which is customarily sent to PSI. Information from the pyrotechnic operator post display report is needed to complete the Fireworks Post Event Report. PSI often does not receive its copy of the pyrotechnic operator post display report until after the 10 day period. Accordingly, PSI requests that the Tentative Order be modified to provide 30 days for completion of the Fireworks Post Event Report. In addition, PSI requests that the Fireworks Post Event Report for shows on July 4th be due to the Regional Board by August 15.

Thank you for the opportunity to provide comments on the Tentative Order. We and PSI look forward to presenting our comments and answering any questions the Regional Board may have at the May 11, 2011 hearing.

Respectfully submitted,
Hunsucker Goodstein & Nelson PC



Brian L. Zagon

BLZ:mm
cc: Gary Brown (via Email)