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11 FOUNDATION

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SAN DIEGO, CENTRAL DISTRICT
14

15 COASTAL ENVIRONMENTAL RIGHTS
16 FOUNDATION, INC., a California non-profit
public benefit corporation;

17 Plaintiff and Petitioner,

18 v.

19 CITY OF SAN DIEGO, a California public
20 agency;

21 Respondent.

22 LA JOLLA COMMUNITY FIREWORKS
23 FOUNDATIONS, INC., a California non-profit
public benefit corporation; PROMOTE LA
24 JOLLA, INC., a California non-profit corporation
or business association;

25 Defendants and Real Parties-in-Interest.
26
27
28

CASE NO. 37-2010-00095062-CU-TT-CTL

**LA JOLLA COMMUNITY
FIREWORKS FOUNDATION'S
OPPOSITION TO COASTAL
ENVIRONMENTAL RIGHTS
FOUNDATION'S EX PARTE
APPLICATION FOR A TEMPORARY
RESTRAINING ORDER**

DATE: June 30, 2010
TIME: 8:30 a.m.
JUDGE: Hon. Linda B. Quinn
DEPT: C-74

Action Filed: June 25, 2010

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1 **I. INTRODUCTION**

2 The La Jolla Community Fireworks Foundation (“Foundation”) is a 100% community-
3 funded, non-profit organization formed in 2009 for the purpose of maintaining a 25-year La Jolla
4 tradition of celebrating Independence Day with a fireworks display. Fireworks displays have been
5 an integral part of Independence Day celebrations since the country’s founding 234 years ago.¹
6 The La Jolla fireworks show, like the hundreds of Fourth of July fireworks displays throughout
7 California and the United States, does not violate federal or state environmental laws.

8 Despite wild and baseless exaggerations that the “annual La Jolla Cove events have been
9 undertaken illegally for approximately the last 25 years,” the fireworks pose no threat of
10 irreparable harm to the environment. CERF points to nothing more than “potential” or
11 “reasonably foreseeable” harm, which is not the standard for the extraordinary relief requested.
12 Until the filing of a complaint days ago (or until late May 2010, when the Foundation first
13 received a letter from Coastal Environmental Rights Foundation’s (“CERF”)), no one claimed that
14 these fireworks were illegal or even potentially environmentally harmful. A San Diego regulator
15 advised the public recently that with respect to coastal fireworks, “our interpretation at this point is
16 that it’s a very de-minimis (minimal) water-quality problem.”² Against this background, CERF
17 has elected to manufacture an emergency where none exists and prays for the judicial cancellation
18 of this week’s Independence Day show in La Jolla after all the contracts, arrangements, trips, and
19 commitments have been in place.

20 Plainly, the intended consequences of CERF’s actions are not limited to La Jolla. CERF’s
21 application gives no explanation of why La Jolla’s celebration departs legally, in its view, from the
22 hundreds of coastal and inland Independence Day celebrations across the country. The U.S. Coast
23

24 ¹ Congress encouraged fireworks on the Fourth of July by authorizing a display on July 4, 1777.
25 J. Heintze, “The First Fireworks on the Fourth of July,” American Univ.,
<http://www1.american.edu/heintze/fireworks.htm>, , Exhibit (“Ex.”) A to the Declaration of
John Everett (“Everett Decl.”), filed concurrently herewith.

26 ² “Could July 4 Fireworks Be at Risk?” *Orange County Register*,
27 <http://www.ocregister.com/articles/fireworks-229160-san-shows.html>, (quoting Regional
28 Water Quality Control Board Senior Engineer Brian Kelley) (Jan. 14, 2010), Everett Decl.,
Ex. B

1 Guard and the City of San Diego have issued all required permits for the 2010 display, as they
2 have done for years. The community celebration is expected to attract between 13,000 and 20,000
3 spectators at various regional venues around La Jolla, as it has done for years. The City's issuance
4 of this year's park use permit was (again) purely ministerial. In fact, CEQA has never been held to
5 apply to Independence Day fireworks. Indeed, CERF's unprecedented theory of CEQA's
6 application to Independence Day fireworks would lead to absurd results; namely, time-consuming
7 and cost-prohibitive CEQA analysis and Environmental Impact Reports for individual displays
8 across California, both coastal and inland (and virtually all community activities requiring City
9 permits, like weddings, birthday parties and corporate picnics in City parks).

10 In its role as the local permitting authority under the Coastal Act, the City separately
11 determined that the annual La Jolla show is an exempt one-day "temporary event" requiring no
12 coastal development permit. The California Coastal Commission, presented with a similar
13 question last month, advised the sponsors of San Diego Bay's Fourth of July fireworks display that
14 no coastal development permit is required, even after this year's decision in *Gualala Festivals*
15 *Committee v. California Coastal Commission*, 183 Cal. App. 4th 60 (2010), *review denied* (June 9,
16 2010).³ The State of California is so unalarmed by the *de minimis* water quality impacts of once-a-
17 year Independence Day fireworks displays around the state that it has decided to leave the question
18 of whether fireworks require a Clean Water Act "general permit" for **after** July 4, 2010.⁴ When
19 the state commences discussions **on or after** July 5, the Foundation plans to participate.

20 CERF stands alone in the extreme, illogical, and scientifically unsupported view that the
21 annual 20-25 minute La Jolla fireworks celebration has been illegal for decades and must be
22 stopped in 2010 in the name of "patriotism, freedom and a successful democracy."⁵ No other one-
23

24 ³ California Coastal Commission letter to San Diego Armed Services YMCA, dated June 7,
25 2010, Everett Decl., Ex. C.

26 ⁴ California Regional Water Quality Control Board Executive Officer's Report, p. 7 (June 9,
27 2010) (the San Diego Regional Water Quality Control Board plans to draft a "general permit"
28 to regulate firework-related wastes discharged into surface water in 2011), Everett Decl.,
Ex. D.

⁵ CERF's Complaint and Petition for Writ of Mandate, ¶ 4 at 2:23-25 (June 25, 2010).

1 day, Fourth of July fireworks display in San Diego or elsewhere in California (or in the United
2 States for that matter) has been similarly targeted through litigation to drown out a community's
3 valued patriotic celebration. Indeed, nothing has changed in the last year (or last 25 years) to
4 justify the attempted disruption and shutdown of this year's July 4, 2010 La Jolla display at the
5 eleventh hour. The same professional fireworks company that operates the Summer Pops
6 fireworks over San Diego Bay will administer the La Jolla show in a similar manner. The show
7 continues to be performed from land well outside any state-designated "Area of Special Biological
8 Significance" ("ASBS"). Not a ~~shred~~ of La Jolla-based science has been offered suggesting
9 irreparable harm to the local marine environment.

10 Extensive and expensive commitments have been made for the Fourth of July celebration
11 by the Foundation, La Jolla's restaurants and their patrons, La Jolla's hotels and their guests, a
12 military band, international musical performers, and thousands of spectators. Indeed, CERF
13 admits that its own "members" have been regular spectators of the La Jolla Independence Day
14 celebration and took note of the display's popularity.⁶ Coastal community fireworks in fire-prone
15 Southern California are commonplace⁷ and are far less dangerous to public safety than private and
16 unsupervised fireworks displays.⁸

17 CERF's incoherent and scientifically baseless attack against the La Jolla fireworks not only
18 lacks any documented adverse impacts to La Jolla Cove over the last 25 years, but it is has been
19 strategically timed to inflict the maximum economic and psychological disruption to La Jolla's
20 businesses and its community. This lawsuit and its overly broad request to enjoin the fireworks in
21 its third decade was timed strategically, according to CERF's attorney, the week before the show
22 and "as late in the week as possible."⁹ Absolutely nothing warrants such delay and CERF's

24 ⁶ CERF's Complaint and Petition for Writ of Mandate, ¶36, p. 9 (June 25, 2010); Gonzalez
Decl., ¶ 2.

25 ⁷ Over-the-water fireworks will take place in 2010 locally in San Diego Bay, Imperial Beach,
26 Coronado, La Jolla, the Del Mar Fairgrounds, and San Clemente.

26 ⁸ See Declaration of Javier Mainar (San Diego Fire Chief). *Where?*

27 ⁹ See "Group files lawsuit to stop La Jolla fireworks show," *La Jolla Light* (June 25, 2010),
28 Everett Decl., Ex. E.

1 boastful posturing to the news media against the Foundation and its civic supporters that if the La
2 Jolla fireworks display proceeds this year, as it has for the last 24 years, “he [Mr. Gonzalez of
3 CERF] would be there with police and a restraining order.”¹⁰ His message to La Jolla this
4 Independence Day is to “go elsewhere.”

5 CERF did not threaten the Foundation until late May 2010, only weeks before this year’s
6 show.¹¹ Despite the Foundation’s request to meet on June 22 to discuss CERF’s concerns and
7 potential compromise, Marco Gonzalez—is his dual role as CERF’s counsel and Executive
8 Director—responded that unless the display was cancelled altogether there would be no purpose in
9 meeting.¹² As discussed herein, CERF’s ex parte petition to stop a well-respected civic and
10 patriotic tradition days before the show falls far short of the standard necessary for a restraining
11 order.

12 **II. STATEMENT OF FACTS**

13 The Fourth of July fireworks display has taken place annually in La Jolla since the 1980s
14 for approximately the past 25 years. *See* Marengo Decl., ¶ 2. The fireworks are launched from
15 City property at Ellen Browning Scripps Park in La Jolla, and the fireworks are observed by
16 approximately 13,000 to 20,000 San Diegans and patrons of La Jolla businesses and hotels.¹³

17 The Foundation assumed the sponsorship of the annual La Jolla fireworks in 2008 from a
18 local La Jolla businessman and the owner of George’s at the Cove restaurant, who sponsored the
19 La Jolla fireworks since the 1980s through 2008. Marengo Decl., ¶ 3. The Foundation has applied
20 for Section 501(c)(3) status and is a non-profit, 100% community-funded organization. Its
21 mission is to “promote both patriotism and community spirit by preserving the annual Fourth of
22 July observance for the community of La Jolla and the citizens of San Diego County, California,

24 ¹⁰ “Group Threatens to Sue Over La Jolla Cove Fireworks Show,” *10 News.com* (June 22, 2010),
Declaration of Deborah Marengo (“Marengo Decl.”), Ex. J, filed concurrently herewith.

25 ¹¹ CERF’s May 14, 2010 letter was not served on the Foundation until after May 20, 2010.
CERF’s letter. *See* Marengo Decl., Ex. H

26 ¹² E-mail exchange between Deborah Marengo and Marco Gonzalez (June 22, 2010). *See*
27 Marengo Decl., Ex. I.

28 ¹³ Marengo Decl., ¶ 2; *see also* CERF’s Complaint and Petition, ¶36, at 9:12-14.

1 through the presentation of a fireworks display and concert.” *Id.*, ¶ 4.

2 The Foundation raises approximately \$30,000 annually to produce the La Jolla fireworks
3 display on the Fourth of July, which is free to the public. *Id.*, ¶ 5. The Foundation has no paid
4 employees, only unpaid volunteers. *Id.*, ¶ 5. All monies raised are spent on the Fourth of July
5 show. Donations range from \$10 per individual to \$100-\$1,000 per family. *Id.*, ¶ 11. The
6 approximately \$30,000 in costs and expenses necessary to sponsor this year’s July 4 fireworks
7 display have been committed and are not recoverable. *Id.*, ¶ 5.

8 There is a major influx of visitors and significant positive economic benefit to La Jolla as a
9 result of the Fourth of July fireworks. Declarations of San Diego City Councilmembers Sherri S.
10 Lightner and Kevin Faulconer, ¶¶ 3-4. Many La Jolla hotels and restaurants book up months in
11 advance of the Fourth of July celebration. Declaration of Terrance Underwood (Grande Colonial
12 hotel), ¶¶ 3-5. The San Diego Lodging Industry Association reports that the Fourth of July
13 fireworks are an economic engine at the peak of the summer travel season, the loss of which would
14 be harmful to the community. Everett Decl., Ex. F. The City receives transient occupancy tax
15 benefits from the hotel nights booked for the weekend. *Id.*, Marengo Decl., ¶ 6.

16 The United States Marine Corps Band from the Third Marine Aircraft Wing has committed
17 to perform at this year’s La Jolla Fourth of July celebration. *Id.*, ¶ 9. The Marine Corps Band
18 chose to perform at the La Jolla fireworks months in advance, to the exclusion of a number of
19 other high-profile Fourth of July shows. *Id.*, ¶ 9. The Marine Corps Band commits to perform
20 only when certain requirements are met, including the popularity of the event and free public
21 attendance. *Id.*, ¶ 9. If the fireworks are cancelled, the Marine Corps Band is expected to cancel
22 its La Jolla performance and support another worthy show, if available time allows. Marengo
23 Decl., ¶ 9. In addition, the Foundation also scheduled international musical performers from the
24 United Kingdom, a musical group called “Bones Apart,” who will serve as special guests of La
25 Jolla and perform alongside the Marine Corps Band. *Id.*, ¶ 9. Arrangements and travel plans for
26 these international performers have already been made. *Id.*, ¶ 9.

27 The Foundation has contracted again this year with Fireworks America, a well-respected
28

1 professional pyrotechnics company that administers fireworks in San Diego and several states.¹⁴
2 Fireworks America produces the San Diego Summer Pops fireworks display. Marengo Decl., ¶ 8.
3 It has also performed the La Jolla fireworks for approximately 14 years without incident or report
4 of environmental damage. *Id.*, ¶ 7; Bartolotta Decl., ¶3. In its 16-year history, Fireworks America
5 has never been advised by any government authority that fireworks displays violate the law.
6 Bartolotta Decl., ¶¶ 2, 7. Far bigger coastal Fourth of July fireworks displays take place in Boston,
7 New York, Washington D.C. without any regulatory issues. *Id.*, ¶ 7. The Foundation coordinates
8 with Fireworks America to ensure that all required permitting and safety precautions are followed.
9 Marengo Decl., ¶ 8.

10 Fireworks America has obtained permits from the San Diego Fire Department and the U.S.
11 Coast Guard for the La Jolla display. Bartolotta Decl., ¶ 3; Marengo Decl., ¶ 12. It also notifies
12 the FAA. Bartolotta Decl., ¶ 3. This year's La Jolla fireworks is substantially similar to the
13 displays in past years and will last 20 to 25 minutes. *Id.*, ¶ 4. The fireworks display is located
14 outside of the La Jolla Cove ASBS. Marengo Decl., ¶ 2; Bartolotta Decl., ¶ 5.

15 The City issued a Parks Use Permit for the La Jolla fireworks on or about June 16, 2010
16 and a San Diego Fire Department permit on or about June 23, 2010. Marengo Decl., ¶ 12. The
17 City has expressly found that the La Jolla fireworks would not require a Coastal Development
18 Permit ("CDP") under the Coastal Act. *See* Declaration of Kelly Broughton (Dev. Serv. Dept.
19 Dir.), ¶ 12. The City also found that its issuance of the City permit was a ministerial decision.
20 *See* Declaration of Stacey LoModico (Dir. of Parks and Rec.).

21 The annual fireworks have taken place for decades without complaint or scientific evidence
22 of harm in front of the world's premier ocean research institute, the Scripps Institution of
23 Oceanography. Marengo Decl., ¶ 13. They even receive extremely supportive praise from the
24 local community. Councilmembers Lightner and Faulconer Decls., ¶ 4.

25 The Foundation first received a Notice of Intent to Sue ("Notice") from CERF's attorney,
26

27 ¹⁴ Marengo Decl., ¶ 7; Declaration of Joseph R. Bartolotta ("Bartolotta Decl."), ¶ 2, filed
28 concurrently herewith.

1 Mr. Marco Gonzalez, on or about May 20, 2010. *Id.*, ¶ 14. That Notice never mentioned CEQA.
2 In CERF's Notice, Mr. Gonzalez asserted that the La Jolla fireworks display violates federal clean
3 water and the Coastal Act and demanded the July 4 show be cancelled. *Id.*, ¶ 14. The Foundation
4 sent Mr. Gonzalez an email on June 22, 2010 requesting a meeting. *Id.*, ¶ 15. Mr. Gonzalez
5 replied via email the same day that if the Foundation intended to move forward with this Fourth of
6 July display that there would be no reason to meet, and he would file suit. *Id.*, ¶ 15.

7 Mr. Gonzales has been making public threats against the community show, including
8 during a media interviews on or about June 22 and 29, announcing it would be cancelled and that
9 he plans to come to La Jolla on the Fourth of July accompanied by police officers and a restraining
10 order if the civic display and tradition continues. Marengo Decl., ¶ 16. These threats have
11 seriously disrupted show planning.

12 **III. ARGUMENT**

13 **A. Standard of Review for Preliminary Injunctions**

14 Injunctive relief is an "extraordinary" and drastic remedy, and should be exercised always
15 with great caution.¹⁵ To prevail, a plaintiff seeking a preliminary injunction must meet its burden
16 of proof and satisfy at least three evidentiary prongs: a plaintiff must show (1) it will suffer
17 "irreparable harm" if the injunction is denied;¹⁶ (2) a likelihood of prevailing on the merits at trial
18 and, (3) upon balancing the hardships, that extraordinary relief is warranted. *See Langford v.*
19 *Superior Court*, 43 Cal. 3d 21, 28 (1987). An ex parte hearing, as here, delayed so that it need not
20 comply with the normal 16 court days of notice for temporary restraining orders under CCP
21 Section 1005(b) call for extra scrutiny and judicial caution: The ex parte application must be
22 based upon "*personal knowledge of irreparable harm, immediate danger, or other statutory basis*

23 _____
24 ¹⁵ *Dept. of Fish and Game v. Anderson-Cottonwood Irrigation Dist.*, 8 Cal. App. 4th 1554, 1565
25 (1992) (an "injunction is an unusual or extraordinary equitable remedy which will not be
26 granted if the remedy at law (usually damages) will adequately compensate the injured
27 plaintiff.").

26 ¹⁶ *See Korean Philadelphia Presbyterian Church v. California Presbytery Church*, 77 Cal. App.
27 4th 1069, 1084 (2000) ("An injunction properly issues *only* where the right to be protected is
28 clear, injury is impending and so immediately likely as only to be avoided by issuance of the
injunction.").

1 for granting relief ex parte.” Cal. Rules Ct. 3.1202(c) (emphasis added). “Potential” or
2 speculative harm is insufficient.

3 Lastly, even if all prongs for an ex parte injunction can be shown, an injunction remains
4 unavailable where there is an adequate legal remedy available. Cal. Code Civ. Pro. § 526; *See*
5 *Simms v. NPCK Enterprises, Inc.*, 109 Cal. App. 4th 233, 242-43 (2003). Mandamus proceedings
6 may furnish an adequate remedy. *See Moore v. Superior Court*, 6 Cal. 2d. 421, 423-24 (1936).

7 The reluctance of California courts to grant injunctive relief is especially strong where free
8 speech is implicated, as here, with the La Jolla Independence Day civic celebration. The
9 California Constitution’s free speech provisions, Art. I, § 2, have been held to be “more protective
10 and inclusive of rights to expression of speech than their federal counterparts.” *See San Diego*
11 *Unified Port Dist. v. United States Citizens Patrol*, 63 Cal. App. 4th 964, 970 (1998) (internal
12 quotes omitted). Prior restraints on political speech, in the form of injunctive relief, are generally
13 impermissible. *See Wilson v. Sup. Ct.*, 13 Cal. 3d 652, 658 (1975).

14 **B. Prong One: CERF Cannot Show “Irreparable Harm”**

15 CERF has not come forth with any La Jolla-specific evidence that the City-permitted 2010
16 La Jolla fireworks will result in irreparable injury to the environment. It has not shown that any of
17 the annual Scripps Park-based fireworks from the 1980s through 2009 injured the La Jolla
18 environment. Contrary to CERF’s theory of “potential harm,” a San Diego regulator looking at
19 this very issue of fireworks displays stated they pose at most a *de minimis* threat to water quality.
20 Everett Decl., Ex. C. The fireworks actually encourage the public to appreciate La Jolla’s coastal
21 resources.

22 CERF speculates that La Jolla’s Cove’s water quality will be irreparably harmed on this
23 2010 Independence Day evening as it has for the last 24 years. But CERF cannot back these
24 exaggerated theories with facts or science. First, despite CERF’s allegations to the contrary, the
25 fireworks will be launched well outside of the ASBS. Bartolotta Decl., ¶ 5. Moreover, as noted in
26 the CEQA Initial Study performed in conjunction with the Ocean Plan Exception for the
27 University of California Scripps Institution of Oceanography, nearshore currents in the La Jolla
28 and Scripps ASBS areas flow to the south and thus away from the ASBS: “[C]loser to shore, the

1 current over the coastal shelf, in depths up to 60 meters, flows toward the equator. The longshore
2 current has a net southward flow” See Exs. G and H to the Everett Decl. Prevailing winds
3 also favor on-shore breezes, and blow from the west-northwest *away* from the ASBS area. See
4 NOAA ISMC Station Climatic Narrative for San Diego, Everett Decl., Ex. I.

5 Regardless, there is no evidence that annual fireworks displays result in significant impacts
6 to water quality or the environment. The water quality impacts of fireworks displays have been
7 considered by both the San Diego and Lahontan Regional Water Quality Control Boards. In Lake
8 Tahoe (in the Lahontan Region), for example, an inland lake *lacking tidal circulation* was
9 analyzed. Only a single constituent of fireworks was detectable above background levels
10 following the Fourth of July displays in 2001 and 2002. See Everett Decl., Ex. I at 2. This
11 constituent, perchlorate, returned to undetectable levels one day later. *Id.*

12 Similarly, recent monitoring of the impacts of SeaWorld San Diego’s *nightly* public
13 fireworks displays, launched over the nearly enclosed Mission Bay, demonstrated virtually no
14 water quality impacts associated with fireworks. Explosive constituents were generally undetected
15 or, if detected, similar to “background levels.” The only elevated constituent found in the water at
16 SeaWorld was perchlorate, detected at levels close to state-prescribed levels for *drinking water*
17 and thought to “attenuate quickly.” Everett Decl., Ex. K at ES-1, 4-1, 4-2, 5-1.

18 Unlike the Foundation’s 20-25 minute annual show, however, SeaWorld sponsors between
19 110 and 120 public fireworks displays during the spring and summer. *Id.* at 2-1. And, of course,
20 Mission Bay—with only one inlet to the Pacific Ocean—has immensely less circulation than the
21 open ocean along La Jolla. Yet, even SeaWorld’s 110-120 annual fireworks displays in Mission
22 Bay generated little, if any discernible impacts to the environment.¹⁷

23 Similarly, CERF has come forward with no evidence that any marine mammals at the
24 Children’s Pool have been in the past or will be harmed in the future by the Fourth of July

25 ¹⁷ See *id.* at 5-1, 5-2 (in addition to the lack of water quality impacts, there was little variation
26 between the FDZ and reference areas in terms of sediment contamination, and survival rates
27 among marine amphipods were quite similar between the FDZ and reference areas). A
28 2008/2009 study found *greater* biological density and diversity among benthic species in the
FDZ zones, as compared to reference areas. *Id.* at 4-5.

1 fireworks display. The preeminent marine research facility in the world, the Scripps Institution of
2 Oceanography, is adjacent to the La Jolla Cove area and has *never* expressed concern about the
3 impacts to the La Jolla area marine ecosystem from Fourth of July fireworks.

4 In sum, *de minimis* amounts of biodegradable paper debris, and trace concentrations of
5 fireworks constituents (assuming, in light of the SeaWorld data, that any would even reach the
6 water), cannot support a finding of irreparable (*i.e.*, irreversible) injury to the environment that
7 CERF must show. CERF offers only rank speculation. The technical debate that CERF seeks to
8 have this Court decide based on non-Jolla evidence on two day's notice will be better determined
9 by state regulators within the next year.

10 Adequate legal remedies are also available to CERF that make *ex parte* relief unwarranted.
11 Here, it is plain that an adequate remedy already exists at law—CERF is seeking a writ of mandate
12 compelling the City to perform CEQA review of fireworks and to mandate a coastal development
13 permit (“CDP”) under the Coastal Act. CERF is also seeking a declaratory judgment. Thus, the
14 combination of CERF’s mandamus and declaratory actions represent an adequate remedy at law.

15 C. **Prong Two: The “Balance of Harms” in Cancelling the 2010 Independence**
16 **Day Show Weighs in Favor of the Foundation and the La Jolla Fireworks**

17 As the supporting declarations from elected City representatives, to La Jolla business
18 owners and sponsors set forth, the harms that any cancellation of the Fourth of July show will
19 cause are severe for La Jolla residents, businesses owners, military supporters, and visitors. The
20 celebration’s public benefits are widespread, ranging from civic pride to increased tourism and
21 substantial economic benefits to the community. Councilmembers Faulconer and Lightner Decl.,
22 ¶¶ 3-4. Substantial sums have been committed to the show, which cannot at this late juncture be
23 recovered. Marengo Decl., ¶ 5.

24 Equally important, the La Jolla Independence Day celebration is protected political speech,
25 an opportunity for a diverse array of San Diego residents and visitors to gather for a single
26 purpose: to celebrate our nation’s independence. Prior restraints on political speech and
27 gatherings, in the form of injunctive relief, are generally impermissible under the California and
28 United States Constitutions. *See Wilson v. Sup. Ct.*, 13 Cal. 3d 652, 658 (1975). CERF’s effort to

1 rescind all permits authorizing assembly for an Independence Day celebration with a 25-year
2 history and for its supporters to “go elsewhere” is an impermissible attack upon the display’s First
3 Amendment expressive message.

4 CERF’S “emergency” ex parte petition is plainly timed to inflict the most economic and
5 psychological harm on the community. Where injunctions are misused to manufacture civic
6 turmoil and score political points, as here, courts are reluctant to grant such relief. *See Finnie v.*
7 *Town of Tiburon*, 199 Cal. App. 3d 1, 14 (1988) (noting that is “well settled” that laches is
8 established through unreasonable delay and prejudice, and that laches is a defense against
9 injunctive relief).

10 **D. Prong Three: CERF Cannot Show a “Likelihood of Success” on the Merits**
11 **Because Plaintiff Calls for an Entirely New Application of CEQA and the**
12 **Coastal Act That Has Never Been Accepted**

13 **1. CERF’s CEQA Claims Are Unsupported By Fact and Law**

14 CERF’s contention that the issuance of a park (or any) permit for a single, annual public
15 display of fireworks triggers CEQA review is an entirely new and erroneous construction of law,
16 for which CERF has cited no authority. The logical consequence of CERF’s CEQA position is
17 absurd: Every fireworks display in the state, and virtually all City permitting, would henceforth
18 be subject to lengthy and costly environmental review and reporting. CERF’s unprecedented call
19 for the dramatic expansion of CEQA to fireworks and other city permits is not likely to succeed on
20 the merits, and its belatedly-filed request for a restraining order is not an appropriate vehicle to
21 advance such a radical change in the law. Furthermore, because the City’s approval of the park
22 permit¹⁸ was ministerial, and not discretionary, CEQA did not apply.

23 **a. CEQA Does Not Apply to “Ministerial” City Approvals**

24 It is well-settled that “CEQA applies to discretionary actions but does not apply to
25 ministerial actions.” *Health First v. March Joint Powers Auth.*, 174 Cal. App. 4th 1135, 1142-43

26 ¹⁸ CERF argues at length that CEQA review should apply to the City’s issuance of “Special
27 Events Permits.” But since the City determined that a Special Events Permit was not required
28 for the Foundation’s fireworks display, consistent with its long-standing interpretation of the
Municipal Code, and since a Special Events Permit was not issued to the Foundation, CERF’s
argument is irrelevant.

1 (2009). The California Supreme Court recently explained that “CEQA expressly exempts certain
2 projects from its reach. Among these are ‘[m]inisterial projects’—those whose approval or
3 implementation ‘involv[es] little or no personal judgment by the public official as to the wisdom
4 or manner of carrying out the project.’” *Stockton Citizens for Sensible Planning v. City of*
5 *Stockton*, 48 Cal. 4th 481, 498 (2010) (quoting CEQA § 21080(b)(1) and CEQA Guidelines §
6 15369)). Instead, CEQA applies only to “discretionary projects,” or projects that require the
7 “exercise of judgment or deliberation . . . as distinguished from situations where the public agency
8 . . . merely has to determine whether there has been conformity with applicable statutes,
9 ordinances, and regulations.” CEQA Guidelines § 15357, CEQA § 21080(a), (b)(1) (“CEQA . . .
10 does not apply to . . . “[m]inisterial projects.”). “Ministerial” actions are defined in CEQA as
11 governmental decisions:

12 involving little or no personal judgment by the public official as to the wisdom
13 or manner of carrying out the project. The public official merely applies the law
14 to the facts as presented but uses no special discretion or judgment in reaching a
15 decision. A ministerial decision involves only the use of fixed standards or
16 objective measurements, and the public official cannot use personal, subjective
17 judgment in deciding whether or how the project should be carried out.

18 CEQA Guidelines § 15369.

19 **b. The City’s Issuance of the Park Permit Was “Ministerial”**

20 “The determination of what is ‘ministerial’ can most appropriately be made by the
21 particular agency involved based upon its analysis of its own laws.” *Id.*, § 15268(a); *Health First*,
22 174 Cal. App. 4th at 1144 (same). The City has uniformly held that its issuance of Park Use
23 Permits (including for fireworks) is a ministerial action and thus beyond the purview of CEQA
24 (*see* LoMedico and Chief Mainar Decls.), and the City’s position is fully supported by CEQA.
25 Moreover, the City’s interpretation of its own municipal code is entitled to “considerable
26 deference” from the Court. *Citizens for Responsible Equitable Env’t Dev. v. City of San Diego*,
27 184 Cal. App. 4th 1032, 1041-42, 1047 (2010).

28 In order to discharge fireworks in a public park within the City, a park permit must first be
obtained. Municipal Code §§ 63.0102(b)(3) and 63.0103. With regard to the issuance of park
permits, the Municipal Code provides that:

1 The City Manager *shall* issue the permit if he or she finds that the activity will not
2 conflict or interfere with any other event previously scheduled and that the
3 activity will not unreasonably add to congestion or interfere with or impede the
4 normal flow of vehicular or pedestrian traffic.

5 City of San Diego Municipal Code, § 63.0103, subd. (d).

6 The Municipal Code is very clear that the City manager must issue the permit if the above
7 findings can be made.¹⁹ In making this determination, the City Manger may not exercise any
8 “personal judgment . . . as to the *wisdom or manner of carrying out the project*,” or any
9 “subjective judgment in deciding *whether or how* the project should be carried out.” CEQA
10 Guidelines, § 15369 (emphasis added). Nor may the City Manager consider any factors other than
11 those specifically enumerated in the Municipal Code. If the Municipal Code standards are
12 satisfied, the permit will issue, as requested, and the City may not modify or change the proposed
13 event in any way. As such, a park permit is plainly ministerial and exempt from CEQA review.
14 CEQA § 21080, CEQA Guidelines §§ 15268(a) and 15369.²⁰

15 **2. CERF's Coastal Act Claims Fail as a Matter of Law Because the La Jolla
16 Fireworks Constitute a “Temporary Event” Exempt from Coastal Act
17 Permitting**

18 Both the Coastal Commission and the City have concluded that the Independence Day
19 fireworks in two separate areas of San Diego’s coastal zone are exempt from permitting. Everett
20 Decl., Ex. C; Broughton Decl. The Coastal Act, at Cal. Pub. Res. Code Section 30519, provides

21 ¹⁹ Where a permit application is denied, the applicant may submit a new request proposing an
22 alternate date, time or location for the event. The City Manager may also authorize the activity
23 at another date, time or location, concurrently with denial of a permit application. Municipal
24 Code § 63.0103(g), (h).

25 ²⁰ Even assuming *arguendo* that the City Manager’s approval of a park permit did include some
26 discretionary element, that discretion would be limited solely to traffic/congestion, and would
27 not extend to the alleged impacts from Independence Day fireworks to “water quality,
28 environmentally sensitive lands, and sensitive biological resources” that are asserted in this
29 suit. Complaint and Petition, ¶ 46. Because the City lacked discretion to address or mitigate
30 any of these alleged harms as part of the park permitting process, it also lacked discretion to
31 prepare an EIR to evaluate same. *San Diego Navy Broadway Complex Coalition v. City of
32 San Diego*, No. D055699, 2010 Cal. App. LEXIS 898, *18-30 (June 17, 2010) (City’s ability
33 to modify project’s aesthetic elements as part of a consistency review did not provide
34 discretion to address potential impacts on global climate change; accordingly, CEQA did not
35 authorize environmental review of climate change in connection with the consistency review.).
36 “Where an agency has no authority to modify a project based on the analysis contained in the
37 EIR, there is no basis for requiring the agency to prepare the EIR.” *Id.* at *25.

1 that once a local coastal program (“LCP”) has been certified, the Coastal Commission’s
2 development review authority shall no longer be exercised within any portion of the LCP. Instead,
3 the authority to review is delegated to the local government. The La Jolla fireworks display is
4 located at Scripps Park, which is located within a certified LCP and therefore subject to the
5 exclusive jurisdiction of the City for Coastal Act permitting. *See* Everett Decl., Ex. L. Exercising
6 exclusive jurisdiction, the City advised the Foundation that the La Jolla fireworks display is
7 *exempt* from Coastal Development Permit (“CDP”) requirements. *See* Broughton Decl., ¶ 12.

8 The “temporary event” exemptions from a coastal development permit are set forth in
9 Section 126.0704 of the Municipal Code:

10 The following coastal development is exempt from the requirement to obtain a Coastal
Development Permit.

11 ...

(d) A *temporary event* which does not meet all of the following criteria:

- 12 (1) The event is held between Memorial Day and Labor Day; and,
- 13 (2) The event will occupy all or a portion of sandy beach or public parking area; and
- 14 (3) The event involves a charge for general public admission or seating where no fee is
currently charged for use of the same area (not including booth or entry fees).

15 Although the event does occur between Memorial and Labor Day, it **does not** occupy all or
16 a portion of sandy beach and is a free public event. Therefore, as the City correctly concluded, the
17 La Jolla fireworks display is a “temporary event” exempt from any CDP obligations.

18 San Diego Municipal Code does contain provisions allowing the City Manager to exercise
19 discretion and “override” the exemption to require a CDP for “temporary events” that may impact
20 public access or environmentally sensitive lands.²¹ The City concluded there was no reason to
21 override exemption. *See* Broughton Decl., ¶¶ 4-12. That is because there is no evidence in the 25-
22 year history of the La Jolla fireworks to suggest that direct or indirect impacts to environmentally

23 ²¹ Section 126.0704(d)(4)-(6) lists the circumstances where this finding may be made:

24 [A] *temporary event* which does not meet all of the criteria in Sections 126.0704(d)(1)-(3)
25 [and which is therefore exempt from CDP obligations] may require a Coastal Development
26 Permit if the City Manager determines the event has the potential to adversely affect public
access to the shoreline and/or *environmentally sensitive lands*, and the event involves any of
the following circumstances:

- 27 (4) The event and its associated activities or access requirements will either directly or
28 indirectly impact *environmentally sensitive lands*.

1 sensitive lands have ever occurred from the annual display. In addition, the display does not
2 significantly impact public use or access to coastal waters or parking. Furthermore, the fireworks
3 have not historically required a CDP. The City effectively agreed with the Foundation's position
4 that none of the discretionary criteria can be met to require a CDP, and the La Jolla fireworks
5 meets all of the criteria necessary for a CDP exemption under the City Municipal Code. *See*
6 *Everett Decl., Ex. L.*

7 The recent decision in *Gualala Festivals Committee v. California Coastal Commission*,
8 183 Cal. App. 4th 60 (2010), does not change the long-standing Coastal Act permit exemptions.
9 An activity that required a permit before *Gualala* still requires one; activities that were exempt
10 from a CDP under the Municipal Code remain exempt post-*Gualala*. *Gualala* simply holds that
11 the City, which has been delegated exclusive authority for development review within an LCP,
12 retains the jurisdiction to decide whether a CDP is necessary for a temporary fireworks event or
13 whether an exemption applies.

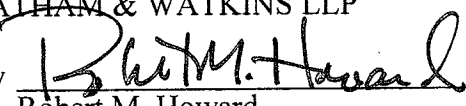
14 The facts of *Gualala* are easily distinguishable from those of the La Jolla show. In
15 *Gualala*, the Commission had warned the festival committee nearly a year in advance that it may
16 need to obtain a CDP. Specific and documented impacts had been found during prior displays,
17 including well-documented impacts to sensitive species that are not present in La Jolla. In
18 addition, the fireworks impeded public access to the coast by blocking a public access easement to
19 the beach. None of that exists at the La Jolla show. For La Jolla, the permitting authority (*i.e.*,
20 City) correctly concluded that Independence Day fireworks are exempt from a CDP.

21 **IV. CONCLUSION**

22 For the foregoing reasons, the Foundation respectfully requests that the Court deny
23 CERF's request for a temporary restraining order against the 2010 Independence Day show.

24 Dated: June 29, 2010

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