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May 14, 2010

Adam Harris
La Jolla Community Fireworks Foundation
7724 Girard Avenue
La Jolla, CA 92037

VIA FIRST CLASS MAIL AND ELECTRONIC MAIL

**Re: Notice of Legal Obligation for Fourth of July Fireworks Display
Clean Water Act, Water Code, and Coastal Act Requirements**

Dear Mr. Harris,

Please accept this letter on behalf of, Coastal Environmental Rights Foundation ("CERF") regarding the La Jolla Community Fireworks Foundation's continuing, and anticipated future non-permitted discharge of pollutants from firework displays into La Jolla Cove, and the Pacific Ocean, in violation of the Clean Water Act ("Act")¹, the California Water Quality Control Plan for Ocean Waters of California, and the Coastal Act.

CERF is a nonprofit environmental organization founded by surfers in North San Diego County and active throughout California's coastal communities. CERF was established to aggressively advocate, including through litigation, for the protection and enhancement of coastal natural resources and the quality of life for coastal residents. CERF urges the La Jolla Community Fireworks Foundation ("Foundation") to cease its discharges into La Jolla Cove. Moving forward with the Fourth of July display will subject the Foundation to enforcement action by various agencies, in addition to civil liability.

I. La Jolla Community Fireworks Foundation Is a Responsible Party

The Foundation is responsible for funding the annual Fourth of July fireworks in La Jolla Cove, and is therefore subject to liability under the Clean Water Act.² Last year, in 2009, the Foundation raised funds (via the San Diego Foundation partner the La Jolla Community Foundation) for the fourth of July fireworks display at La Jolla Cove, thereby releasing substantial amounts of pollution into an area of special biological significance, in violation of the Clean Water Act and California Water Code.³

The summer holiday fireworks displays have been ongoing for 24 years, funded by the Foundation since 2009. No NPDES permit has ever been obtained for such discharges. The Foundation's illegal discharges will continue. According to its website,⁴ the Foundation raised \$27,000 for the fireworks display last year, and intends to continue funding such

¹ 33 U.S.C. § 1342(1)

² 33 U.S.C. § 1365(a).

³ (See: www.lajollalight.com/news/257782-fireworks-campaign-succeeds-in-lighting-up-july-4th)

⁴ (<http://www.savelajollafireworks.com/>).

shows in the future.⁵ Video of the fireworks shows the extent of the aerial explosion.⁶

II. Clean Water Act

The Clean Water Act prohibits the "discharge of any pollutant," unless otherwise allowed by permit.⁷ A NPDES permit must be issued before any pollutant is discharged into Waters of the United States from a point source.⁸ "Any discharge of pollutants not allowed by a NPDES permit is illegal."⁹ Under the Act, a NPDES permit is required when a discharger has (1) discharged (2) a pollutant (3) to waters of the United States (4) from a point source.¹⁰

The Foundation has thus violated and will continue to violate section 1342(1) of the Clean Water Act. This section requires that a National Pollution Discharge Elimination System (NPDES) permit be issued before any pollutant is discharged into waters of the United States. Because the Foundation has been, and will continue to be a continuous point source of pollution to La Jolla Cove, and the Pacific Ocean, the Clean Water Act mandates that an NPDES permit be obtained.¹¹

A. The Foundation is a discharger of chemicals and paper trash associated with fireworks.

When the Foundation discharges fireworks in La Jolla Cove, chemicals contained in fireworks fall into the Pacific Ocean, as does paper trash (potentially laden with chemicals) encasing the fireworks. Fireworks that are shot but which do not explode, so called "dud" fireworks, also discharge into the ocean. This satisfies the first element requiring an NPDES permit.

Discharge is defined in the Act as "any addition of any pollutant to navigable waters from any point source."¹² Fireworks generally include the following chemicals: perchlorate salts, aluminum, magnesium, titanium, barium copper, chloride, and potassium nitrates.

Other hazardous chemical compounds often associated with fireworks include, but are not limited to: arsenic salts, strontium salts, lithium salts, calcium salts, sodium, barium,

⁵ ("This is not a one-time situation"... "We need to sit down with a group of people and establish Save The La Jolla Fireworks as a nonprofit and continue the fundraising every year." see <http://www.lajollalight.com/news/257782-fireworks-campaign-succeeds-in-lighting-up-july-4th>).

⁶ (See <http://www.youtube.com/watch?v=4-uWpbz1mRg>;
<http://www.youtube.com/watch?v=Gp3KXst8eAw&feature=related>)

⁷ 33 U.S.C. § 1311(a).

⁸ 33 U.S.C. § 1342(1).

⁹ *San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153 (9th Cir. 2002).

¹⁰ 33 U.S.C. §§ 1311(a), 1342(a). See also *Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993).

¹¹ (33 U.S.C. § 1342).

¹² 33 U.S.C. § 1362(12).

cadmium, copper, aluminum, titanium, lead, mercury and magnesium. Many of these compounds are often constituents of fireworks for the purpose of creating color and light effects. These constituents have a potential to adversely impact and contribute to degradation of water and sediment quality in La Jolla Cove and the Pacific Ocean.¹³ Of particular concern are arsenic, mercury and lead. These metals are extremely poisonous to human and marine life, and can lead to serious long-term illnesses such as cancer.¹⁴

B. The discharged fireworks and the chemicals contained therein constitute pollution under the Clean Water Act.

The Clean Water Act defines "pollutant" through a specific list of qualifying contaminants.¹⁵ The broad list includes "solid waste...munitions, [and] chemical waste....".¹⁶ The Foundation's discharge of fireworks into La Jolla Cove fits squarely into all three of these categories of pollutants.

Therefore, because the particulate matter, trash, and "dud" fireworks discharged have the potential to degrade the chemical constitution of La Jolla Cove, they qualify as "chemical waste" under the broad categories set forth by the Clean Water Act.

C. The discharged fireworks are deposited into La Jolla Cove, and the Pacific Ocean, navigable waters of the United States.

The third element necessitating an NPDES permit requires that the pollution be deposited into a navigable water of the United States. This element is applicable to the Foundation because the fireworks have a fallout zone that includes La Jolla Cove and the Pacific Ocean, navigable waters of the United States.

According to University of Utah Meteorology Prof. Kevin D. Perry, the particulate from fireworks has a fallout zone of between 500 and 2,000 feet.¹⁷ Perry goes on to state that "heavy metals contained in the fireworks can travel over 100 km downwind over a two day period".¹⁸

D. The fireworks are discharged from a point source.

The barges from which the Foundation's fireworks are shot function as point sources for discharge of polluting chemicals, thereby fulfilling the fourth element requiring the filing

¹³ (See Tentative Addendum to San Diego Regional Water Quality Control Board Order No. R9-2005-0091)

¹⁴ See, e.g., N. Irving Sax & Richard J. Lewis, Sr., DANGEROUS PROPERTIES OF INDUSTRIAL MATERIALS (Van Nostrand Reinhold, New York, 1989, 7th ed.).

¹⁵ 33 U.S.C. § 1362(6).

¹⁶ *Id.*

¹⁷ Amy Davis & Gar Smith, Fallout Over Disneyland, 17 EARTH ISLAND JOURNAL, 2 (Summer, 2002).

¹⁸ *Id.*

of an NPDES permit. Under the Clean Water Act, a "point source" is defined as "any discernible, confined and discrete conveyance... including but not limited to any...vessel or other floating craft, from which pollutants are or may be discharged."¹⁹

The Foundation's discharge of fireworks into the ocean is also not covered under the San Diego Regional Water Quality Control Board's Conditional Waiver No. 11, Aerially Discharged Wastes Over Land. The Foundation discharges fireworks directly within and over the Pacific Ocean, not land. Thus, the Foundation cannot seek coverage under the Conditional Waiver to Waste Discharge Requirements. However, the Conditional Waiver evidences fireworks' potential threat to water quality.²⁰

In summary, the Foundation's non-permitted discharge of fireworks violates the Clean Water Act because the excess particulate matter from the fireworks qualifies as a pollutant that is discharged from a point source into the Pacific Ocean, a navigable water of the United States.

II. Fireworks Displays Require a Coastal Development Permit

The Foundation must also obtain a Coastal Development Permit ("CDP") pursuant to the Coastal Act, for its fireworks displays.²¹ A recent appellate court decision upheld the California Coastal Commission's finding that a fireworks display is a "development" under the Coastal Act.²² Because the Foundation does not have a valid CDP, a Fourth of July fireworks display would be in violation of the Coastal Act, subject to enforcement action and civil liability.²³ Moreover, the annual display does not qualify as an emergency, and therefore would not qualify for an emergency CDP.²⁴

III. Discharge Into an Area of Special Biological Significance is Prohibited

La Jolla Cove is located adjacent to an Area of Special Biological Significance ("ASBS").²⁵ The State Water Resources Control Board, in the Ocean Plan, prohibits any discharges directly into an ASBS.²⁶ The Ocean Plan also states "[d]ischarges shall be located a sufficient distance from such designated areas to assure maintenance of natural water quality conditions in these areas."²⁷ Thus, discharges from fireworks displays in such close proximity to an ASBS are prohibited, especially in light of the afore-mentioned fallout zone that can span from 500 to 2,000 feet and the potential heavy metal dispersion 100

¹⁹ 33 U.S.C. § 1362(14)(emphasis added).

²⁰ See San Diego Regional Water Quality Control Board's Conditional Waiver No. 11, p.2.

²¹ Coastal Act is Public Resources Code § 30000 *et. seq.*

²² *Gualala Festivals Committee v. California Coastal Com.*, (2010) 183 Cal. App. 4th 60, 70.

²³ Public Resources Code § 30820.

²⁴ Public Resources Code § 30624.

²⁵ http://www.sdcoastkeeper.org/assets/pdf/ASBS_brochure.pdf

²⁶ Water Quality Control Plan for Ocean Waters of California, E.1.

²⁷ *Id.*

kilometers downstream.²⁸

Moreover, La Jolla Cove itself is an ecological preserve, where contact with marine life is illegal.²⁹ Because the City of San Diego must authorize the fireworks display³⁰, the City should consider whether allowing a fireworks display in the La Jolla Underwater Park Ecological Reserve and adjacent to an ASBS subjects the City of San Diego itself to liability and/or enforcement action by the Regional Water Quality Control Board.³¹

IV. Conclusion

In light of the numerous legal repercussions to moving forward with the Fourth of July fireworks display, CERF urges the Foundation to give considerable weight to the prospect of legal enforcement. A fireworks display in the currently planned location is prohibited. Should the Foundation desire to relocate the fireworks display to an appropriate location outside of the ecological reserve, and a sufficient distance from the ASBS, it may then apply for an NPDES Permit and CDP.

If you have any questions, please contact Coast Law Group LLP at your earliest convenience.

Sincerely,

COAST LAW GROUP LLP



Marco A. Gonzalez



Livia Borak

Attorneys for
Coastal Environmental Rights Foundation

²⁸ Amy Davis & Gar Smith, Fallout Over Disneyland, 17 EARTH ISLAND JOURNAL, 2 (Summer, 2002).

²⁹ San Diego Municipal Code § 63.40; <http://www.sandiego.gov/lifeguards/beaches/cove.shtml>

³⁰ See City of San Diego Special Event Guidelines: Fireworks displays require Permits from the Fire-Rescue Department Fire Prevention Bureau

³¹ The City should consider applicability of the Ocean Plan, Clean Water Act, and its own municipal code before granting the required permits necessary for a fireworks display.

CC:

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