



1140 South Coast Highway 101
Encinitas, CA 92024

Tel 760-942-8505
Fax 760-942-8515
www.coastlawgroup.com

January 4, 2012

Scott Peters, Chair
Commissioners
San Diego Unified Port District
Board of Port Commissioners
3165 Pacific Highway
San Diego, CA 92101

Via Electronic Mail
egross@portofsandiego.org

Re: San Diego Unified Port District Agenda Item 23
Port Responsibilities Relating to Firework Discharges

Dear Chair Peters and Honorable Port Commissioners:

Please accept this correspondence on behalf of the Coastal Environmental Rights Foundation (CERF) regarding Agenda Item 28, *Consideration of Tenants' Request That District Become Sole NPDES Permit Holder for Fireworks Displays and Direction to Staff*, at the upcoming January 10, 2012 Board of Port Commissioners Hearing. 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. This correspondence is transmitted with the hope that we can avoid future litigation with the Port over fireworks issues.

In 2009, after many years of informal discussions with staff, CERF sent notice to the Board of Port Commissioners that discharge of fireworks into San Diego Bay without a permit was a violation of the Clean Water Act and litigation was imminent. As noted in the Staff Report for the fireworks agenda item, as a result of this Notice, the San Diego Port Tenants Association discontinued its New Year's Eve fireworks displays. Since then, the Regional Water Quality Control Board (Regional Board) has approved a General National Pollutant Discharge Elimination System (NPDES) Permit for the discharge of fireworks to water.¹ CERF, San Diego Coastkeeper, and National Fireworks Assoc. and Fireworks & Stage FX America, Inc have appealed this NPDES Permit on various grounds.² Notwithstanding these appeals, the State Water Resources Control Board has not ordered a stay of the Permit, which remains in full force and effect.

CERF also filed suit against the City of San Diego in 2010 for its approval of the La Jolla Cove 4th of July fireworks event based on the City's failure to conduct the requisite CEQA review in conjunction with its approval of this event. In May 2011, the Court ruled in CERF's favor, finding a discretionary approval of a firework event triggers review pursuant to the California Environmental Quality Act (CEQA).

¹ http://www.swrcb.ca.gov/rwqcb9/water_issues/programs/npdes/fireworks/fireworks.shtml

² The Port Staff Report erroneously mentions only two petitions. (Staff Report, p. 5; see http://waterboards.ca.gov/public_notices/petitions/water_quality/docs/petitions/a2164bpetition.pdf)

As the Board considers the upcoming agenda item, it should also be aware discretionary approval of a project, as defined pursuant to CEQA, includes the approval of discretionary funding for a fireworks event. The Port District admittedly sponsors the Big Bay Boom, as it has since 2001, through its Marketing and Fee for Service Program. (Staff Report, p. 2). As a result, the Port District must a discretionary review process pursuant to CEQA for any such future funding of the Big Bay Boom or any other firework event. This includes approval of any discretionary in-kind services, financial assistance, or agreements contemplated in any of the “alternatives” offered for Port consideration. (Staff Report, pp. 7-8; 14 CCR §15352). Given the extent to which issues of litigation risk are mentioned in the agenda documents, it is imperative that the Board understand it is already at significant risk of a lawsuit from CERF should it continue to fund and provide services for these events.

The Big Bay Boom results in significant individual and cumulative effects in the following impact areas: (i) water quality; (ii) wildlife and marine life, specifically marine mammals; (iii) air quality; and (iv) traffic. It easily meets the first part of the CEQA "project" definition: "an activity which may cause either a direct physical change in the environment, or reasonably foreseeable indirect physical change in the environment...". (Pub. Res. Code §21065). The Port's future allocation of funds through its Marketing and Fee for Service Program, or approval of alternatives including financial assistance or entitlements all satisfy the second part of the definition: "an activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies." (Pub. Res. Code §21065(b); 14 CCR §15352(b)).

In particular, the Post Event Report³ for the 2011 Big Bay Boom details the significant traffic impacts that result from the Big Bay Boom: "This event has steadily increased in attendance size and due to the disproportionate amount of motor vehicle congestion and foot traffic on all major streets additional resources may be needed to address traffic control." (Post Event Report, p. 28). Further, after this year's Big Bay Boom, the Regional Board staff conducted a sweep of the Bay and found floating material remained after the YMCA clean up efforts.⁴ It is therefore likely additional material traveled through the water column, eventually being deposited on the Bay floor. Clearly the Big Bay Boom – as well as other events in the Bay – easily satisfy the low threshold triggering CEQA review.

In light of the Port's unique position as steward of the Bay, holding the tidelands in trust for the public, and the significant efforts to date to clean up the Bay, CERF urges the Port to reconsider its historic funding of the Big Bay Boom, and to deny Mr. Purdon's request in its entirety. Should the Port be inclined to either continue its sponsorship of the event, or decide to pursue any of the suggested alternatives (including alternative 1), the Port must conduct the requisite CEQA review before considering such action. Indeed, the Staff Report notes the Port's decision to take on discharger status for the NPDES Permit would require CEQA review. (Staff Report, p. 3; see also, November 8, 2011 Item 23 Staff Report [postponed]). Likewise, any of the alternatives – other than outright denial of the request – would similarly trigger the need for CEQA review.

³ Pursuant to the General NPDES Permit, various sponsors held 4th of July fireworks events throughout the region, including within San Diego Bay. The NPDES Permit for this event requires a Post Event Monitoring Report, which the YMCA submitted to the Regional Board. A copy of this report is enclosed herewith.

⁴ Personal communication with Regional Board staff.

Last November the Regional Board began its long-awaited hearing for the Shipyard Sediment Site Cleanup Project and Tentative Cleanup and Abatement Order No. R9-2011-0001.⁵ This effort has taken decades, and is still only the beginning of a long-awaited process of restoring the seriously impaired San Diego Bay. At a time when remediation of the Bay may truly become a reality, the Port should be scrutinizing all discharges into the Bay, *especially* those which result in the discharge and deposition of some of the very pollutants subject to the Shipyard Sediment Remediation Project.⁶

In light of the foregoing, CERF urges the Port wholly deny Mr. Purdon's request – including consideration of any alternatives – which would only further contamination of the Bay. Instead, the Port should not only withdraw its historic financial sponsorship of the Big Bay Boom, but also require greater cleanup efforts and monitoring following any firework events within the Bay. Anything less will subject the Port to future liability and would be an abdication of the Port's role as protector of the Tidelands Trust.

Should you have any questions regarding this matter, please feel free to contact our office directly.

Sincerely,

COAST LAW GROUP LLP



Marco A. Gonzalez



Livia Borak

Attorneys for

Coastal Environmental Rights Foundation

CC: Port Commissioners

John Lormon (john.lormon@procopio.com)
Procopio, Cory, Hargreaves & Savitch LLP
525 B Street, Ste. 2200
San Diego, CA 92101
for SD Armed Services YMCA

Glen Googins (ggoogins@ci.chula-vista.ca.us)
City Attorney (cponds@ci.chula-vista.ca.us)
City of Chula Vista
276 Fourth Avenue
Chula Vista, CA 91910
for City of Chula Vista

⁵ http://www.swrcb.ca.gov/rwqcb9/water_issues/programs/shipyards_sediment/index.shtml

⁶ "The San Diego Bay shoreline between Sampson Street and 28th Street is listed on the Clean Water Act (CWA) section 303(d) List of Water Quality Limited Segments for elevated levels of copper, mercury, zinc, polynuclear aromatic hydrocarbons (PAHs), and polychlorinated biphenyls (PCBs) in the marine sediment. These pollutants are impairing the aquatic life, aquatic-dependent wildlife, and human health beneficial uses designated for San Diego Bay." (Draft Program EIR, Shipyard Sediment Remediation Project, p. 3-2).