

## C O M M E N T S

# Goodbye Fourth of July: Are Fireworks Displays Now Subject to CWA Regulation?

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The federal Clean Water Act (CWA)<sup>1</sup> has been instrumental in restoring the health and safety of the nation's bays, harbors, and beaches from industrial and municipal discharges during the past 40 years. But does the CWA now regulate Independence Day fireworks? According to some California regulators, the answer may be yes. Recently, the California Regional Water Quality Control Board for the San Diego Region (San Diego Water Board) has interpreted the CWA in an unprecedented fashion that threatens some of San Diego's most cherished community traditions—and dramatically extends the regulatory scope of the CWA—with potential unintended and far-reaching consequences throughout the United States.

On May 11, 2011, the San Diego Water Board adopted a national pollutant discharge elimination system (NPDES) general permit<sup>2</sup> regulating all fireworks over surface and ocean waters in the San Diego area.<sup>3</sup> Every fireworks display conducted “over or adjacent to surface water bodies” is now subject to the \$1,500 annual permit fee and potential citizen suits, even Independence Day celebrations held once per year and lasting a matter of minutes. The

permit was adopted without evidence that these celebrations cause environmental harm; to the contrary, the permit concluded that individual fireworks displays “pose no significant threat to water quality.” The general permit also was adopted in the absence of any firm legal basis. The San Diego Water Board relied upon the tenuous conclusion that infrequent fireworks displays qualify as “point source” discharges under the CWA, a designation that heretofore has generally been limited to industrial or municipal discharges, and never applied to infrequent, individualized activity like occasional public fireworks displays.

No court or regulatory agency, not even the U.S. Environmental Protection Agency (EPA), has previously contended that isolated public fireworks displays require an NPDES permit. Fireworks celebrations date back to our nation's founding.<sup>4</sup> Fireworks displays over or near water have occurred for years all across the nation—in Baltimore, Boston, New York, Philadelphia, the District of Columbia, San Diego, and a multitude of other communities—without CWA regulation. The Washington, D.C., fireworks show takes place at EPA's doorstep. Given the complete absence of prior regulation or any identified water quality impact, one must question why the San Diego Water Board took the unprecedented step of requiring a CWA permit for Fourth of July fireworks. Much like the tail wagging the dog, the new general permit is a regulation seeking a problem. This extension of the CWA to infrequent, isolated activity (including constitutionally protected civic expression) should be closely scrutinized lest it pave the way for further regulatory overreach.

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*Authors' Note: The authors have represented the La Jolla Community Fireworks Foundation on a pro bono basis in three consecutive years of state court litigation commenced by an environmental group in May 2010 against the fireworks sponsors seeking to stop the annual Fourth of July fireworks near La Jolla Cove in San Diego, California. The annual La Jolla fireworks event has taken place for over 28 years, lasts 25 minutes, and has a \$30,000 budget raised from community donations.*

1. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

2. 33 U.S.C. §1342 generally requires individual permits for the discharge of regulated pollutants. A “general permit” is now authorized by regulation within a specific geographic area to regulate a large number of discharges within a common category or subcategory of dischargers to avoid individual permitting and improve efficiency and timing. 40 C.F.R. §122.28.

3. Order No. R9-2011-0022, NPDES No. CAG999002, General National Pollutant Discharge Elimination System (NPDES) Permit for Residual Firework Pollutant Waste Discharges to Waters of the United States in the San Diego Region From the Public Display of Fireworks [hereinafter San Diego Fireworks General NPDES Permit].

4. The day before the Declaration of Independence was approved, John Adams wrote to his wife that Independence Day “will be the most memorable epoch in the history of America. I am apt to believe that it will be celebrated by succeeding generations as the great anniversary festival . . . It ought to be solemnized with pomp and parade, with shows, games, sports, guns, bells, bonfires, and illuminations, from one end of this continent to the other, from this time forward forever more.” Letter from John Adams, to Abigail Adams, July 3, 1776, Adams Family Papers, Massachusetts Historical Society (emphasis added).

## I. Does the CWA Apply to Occasional Fireworks Displays?

Regardless of the wisdom of the San Diego Water Board's action, a more fundamental question exists—does the Board even have jurisdiction under federal law to regulate occasional fireworks? Arguably not. The CWA empowers states and agencies like the San Diego Water Board to administer the NPDES permitting program.<sup>5</sup> But such delegated authority applies only to pollutants discharged from so-called point sources.<sup>6</sup> The Act defines “point source” as follows:

any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.<sup>7</sup>

As explained below, the statutory text, EPA regulations, judicial construction, and congressional intent all point to the logical conclusion that occasional fireworks displays do not qualify as point source discharges. Rather, when properly construed, the Act should be limited to industrial or municipal discharges from deliberate and systematic conveyances, not everyday, individual activities and above-ground celebratory shows with de minimis potential to cause water quality impacts.

### A. The CWA Focuses on Industrial and Municipal Discharges

After a lengthy analysis of the text and structure of the CWA, the U.S. Court of Appeals for the Second Circuit concluded that “the term ‘point source’ is comprehensible only if it is held to the context of industrial and municipal discharges.”<sup>8</sup> The Second Circuit's reasoning is supported by the CWA's implementing regulations for point sources, which focus on various forms of industrial pollution.<sup>9</sup> Although, by way of example, the regulations identify explosives manufacturing as a specified category of regulated point sources,<sup>10</sup> fireworks displays are not mentioned. Given the breadth of regulations existing with regard to other potential point sources, the conspicuous absence of any reference to fireworks suggests neither the U.S. Congress nor EPA considers such displays to be subject to CWA

regulation.<sup>11</sup> EPA's complete inattention over the last 40 years to fireworks and Fourth of July celebrations corroborates this conclusion.

Guidance published by EPA in 1974 also demonstrates that “point source” regulation should be limited to industrial, municipal, or commercial discharges:

Types of “point” sources requiring a permit for discharges into water bodies include municipal waste water-treatment facilities, manufacturing plants, agriculture, forestry, mining and fishing operations, and other service, wholesale, retail and commercial establishments.<sup>12</sup>

### B. A Point Source Must Be a Systematic Conveyance of Pollutants

Further, the Second Circuit opined that the words used to define point source and the examples given in the statute “evoke images of physical structures and instrumentalities that *systematically* act as a means of *conveying* pollutants from an *industrial source* to navigable waterways.”<sup>13</sup> This logically follows from the Act's definition of point source as a “conveyance,” not merely the source itself.<sup>14</sup>

Committee reports included in the legislative history of the CWA likewise indicate an intent to regulate *conveyances*, as opposed to all identifiable *sources*:

[T]he Administrator should not ignore discharges resulting from point sources other than pipelines or similar conduits. . . . There are many other forms of periodic, though frequent, discharges of pollutants into the water through point sources such as barges, vessels, feedlots, trucks and other conveyances.<sup>15</sup>

The U.S. Court of Appeals for the Ninth Circuit recently came to a similar conclusion—that the CWA regulates conveyances, not necessarily all sources. In *Ecological Rights Foundation v. Pacific Gas & Electric Co.*,<sup>16</sup> the Ninth Circuit rejected an attempt by an environmental group to characterize utility poles as point sources under the CWA.

5. 33 U.S.C. §1342(b).

6. *Id.* at §§1342(b), 1362(12).

7. *Id.* at §1362(14).

8. *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646-47, 23 ELR 21526 (2d Cir. 1993).

9. *See, e.g.*, 40 C.F.R. §§405-471 (point source categories for various industrial and municipal categories, including dairy products processing, grain mills, the textile industry, cement manufacturing, feed lots, fertilizer manufacturing, nonferrous metals manufacturing, steam electric power generating, leather tanning, asbestos manufacturing, and coal mining, among others).

10. 40 C.F.R. §457.

11. *See supra* note 9. Other federal agencies appear to agree that infrequent fireworks displays are not subject to regulation under the CWA. The National Marine Fisheries Service, for example, has taken affirmative steps to preserve and facilitate fireworks displays over and near some of the nation's most sensitive marine resources, without pursuing a CWA permit. *See* National Oceanic & Atmospheric Ass'n Nat'l Marine Fisheries Serv., Letter of Authorization (June 28, 2012) (permitting up to 20 fireworks displays per year over and near the Monterey Bay National Marine Sanctuary and other marine areas in northern California until 2017).

12. U.S. EPA, TOWARD CLEANER WATER: THE NEW PERMIT PROGRAM TO CONTROL WATER POLLUTION, at 2 (1974).

13. *Plaza Health Labs., Inc.*, 3 F.3d at 646 (emphasis added).

14. 33 U.S.C. §1362(14). *See also, e.g.*, *Cordiano v. Metacon Gun Club*, 575 F.3d 199, 224 (2d Cir. 1999) (“The term simply cannot be described as a ‘discernible, confined and discrete conveyance’ with respect to lead that is carried by the wind, some portion of which may happen to land on nearby wetlands.”).

15. 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 51 (Oct. 18, 1972) (report by the U.S. Senate Committee on Public Works recommending passage).

16. No. 11-16042, 2013 U.S. App. LEXIS 6692, \*16 (9th Cir. Apr. 3, 2013) (alleging the utility poles were a source of releases of wood preservatives into stormwater).

Relying in part on the Second Circuit's opinion in *Plaza Health Labs.*,<sup>17</sup> the Ninth Circuit refused to extend the definition of point source from "ditches, culverts, and similar channels" to "any 'tangible, identifiable thing.'"

In fact, the definition of "point source" was initially crafted to distinguish between control requirements for conveyances such as pipes, which are regulated point sources, and control requirements for runoff, which is not.<sup>18</sup> The meaning of point source was not intended to be stretched beyond conveyances to encompass any and all conceivable sources, or human activity adjoining water bodies.

Thus, federal courts sensibly have recognized that the CWA's point source program does not regulate common individualized activity, holding that individual people, animals, and even buildings are not point sources.<sup>19</sup> Occasional community fireworks displays similarly do not fit within any reasonable construction of point source discharges. They are not in any sense "a systematic means of conveying pollutants from an industrial source." Rather, these displays are nonsystematic and infrequent, and constitute civic, expressive conduct, particularly with respect to celebrations of our nation's independence.

### C. Congress Intended CWA Regulation to Be Reasonable, Not Expansive

The legislative history of the CWA recognizes that the definition of point source, if strictly and liberally construed, could lead to unreasonable and unintended regulation of commonplace activity. In such circumstances, congressional intent reflects that EPA should not regulate under the CWA, but instead return to Congress to seek further statutory authorization:

It was suggested to the Conferees that, if the Act's definition of "point source" is strictly and literally construed, it would subject discharges from marine engines on recreational vessels to the requirement for obtaining a permit under this Act. Since there are more than 6 million owners of recreational vessels which would be required to obtain permits if this interpretation were adopted, the Conferees believe that inclusion of recreational marine engines under the permit program would result in an unreasonable expenditure of administrative effort. It was further recognized that to require each and every boat owner to obtain a permit for his engine would be unreasonable. . . . Pending the submission of [a] report [explaining the need for additional legislation,] we would not expect the Adminis-

trator to require permits to be obtained for any discharges from properly functioning marine engines or to institute any prosecution for failure to obtain such permit.<sup>20</sup>

Recently, this intent was confirmed by Congress in response to an expansive judicial interpretation of the CWA in *Northwest Environmental Advocates v. EPA*,<sup>21</sup> where the Ninth Circuit upheld a challenge to EPA regulations that would have exempted marine discharges incidental to normal operations of vessels. A mere six days later, Congress amended the CWA to allow the exemption as to recreational vessels,<sup>22</sup> clarifying that the CWA is not intended to regulate such discharges—which are everyday, individual, and nonsystematic<sup>23</sup> activity with at most a de minimis environmental impact.<sup>24</sup>

Although some courts have concluded that "the term 'point source' [is] not to be interpreted narrowly,"<sup>25</sup> Congress has shown that it also must not be interpreted expansively. Rather, the term should be interpreted reasonably.

20. 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 176-77, 236 (Jan. 1973) (U.S. House of Representatives and Senate considerations of the Conference Report).
21. 537 F.3d 1006, 1010, 42 ELR 20061 (9th Cir. 2008).
22. U.S. EPA, *Clean Boating Act History*, <http://water.epa.gov/lawsregs/lawsguidance/cwa/vessel/CBA/> (last visited May 2, 2013) (explaining how Congress passed the Clean Boating Act of 2008 to correct the Ninth Circuit's decision in *Northwest Environmental Advocates*).
23. EPA's recent efforts in developing the Vessel General Permit (VGP) and the Small Vessel General Permit (sVGP) reinforce the notion that the CWA is not intended to regulate noncommercial or nonindustrial activity, as the VGP and sVGP do not apply to recreational vessels. See U.S. EPA, *Vessel General Permit*, <http://cfpub.epa.gov/npdes/vessels/vgpermit.cfm> (last visited May 6, 2013).
24. Several recent fireworks water quality monitoring studies have shown that occasional community fireworks events have no appreciable effect on water quality, consistent with older studies. See, e.g., Angela M. Leung et al., *Perchlorate Concentrations in Boston's Charles River After the July 4th Fireworks Spectacular*, 23 THYROID 378-79 (Mar. 2013) (perchlorate concentrations returned to background levels the morning following the night-time event and were "far less" than state regulatory limits for perchlorate in drinking water for pregnant women, infants, young children, etc.); Rina Sugimoto et al., *Fireworks Displays and Production as a Perchlorate Emission Source*, 6 INTERDISC. STUD. ENVTL. CHEMISTRY 279-84 (2012) (perchlorate detection in river water returned to background levels within two hours after conclusion of event); CITY OF LAGUNA BEACH DEPT OF WATER QUALITY, PRELIMINARY BRIEF FIREWORKS OCEAN WATER SAMPLING PROGRAM (Aug. 3, 2011) (finding no adverse effect to ocean water quality after 2011 Fourth of July fireworks event); San Diego Fireworks General NPDES Permit, *supra* note 3, at F-23 ("fireworks discharges . . . pose no significant threat to water quality"); U.S. DEPT OF THE NAVY, SILVER STRAND TRAINING COMPLEX ENVIRONMENTAL IMPACT STATEMENT §3.5, at 3.5-22 (2011) (finding no significant impact to water resources from occasional, short-term exposure to flare and smoke residuals); The Lake George Association, *An Initial Study Into the Effects of Fireworks on the Water Quality of Lake George* (Jan. 2010) (finding no adverse effect to water quality from community fireworks shows after the 2009 summer season) (published as *Fire in the Sky, Smoke in the Water: Queen of American Lakes Under Siege From Fireworks Displays?*, 23-2 OCEANOGRAPHY 12 (June 2010)); U.S. EPA, OFFICE OF INSPECTOR GENERAL SCIENTIFIC ANALYSIS OF PERCHLORATE, REPORT NO. 10-P-0101, at 34 (Apr. 19, 2010) ("[T]he burning of rocket propellants, safety flares, and perchlorate-containing fireworks does not result in a significant perchlorate exposure[.]"); Gregory Crofton, *Study: Fireworks Didn't Pollute the Lake*, *TAHOE DAILY TRIB.* (Aug. 12, 2002) ("Tests show fireworks exploded over Lake Tahoe did not taint the supplies of the water company closest to the barge where rockets were launched.").
25. *Northwest Envtl. Def. Ctr.*, 640 F.3d at 1072-73.

17. *Id.* at \*\*16-17.

18. 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, *supra* note 15, at 78.

19. *Plaza Health Labs., Inc.*, 3 F.3d at 649 ("We cannot, however, make the further leap of writing 'human being' into the statutory language without doing violence to the language and structure of the CWA."); *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1099, 28 ELR 21471 (9th Cir. 1998) (individual animal not a point source); *Hudson Riverkeeper Fund v. Harbor at Hastings Assocs.*, 917 F. Supp. 251, 257, 26 ELR 21120 (S.D.N.Y. 1996) (building not a point source).



The Ninth Circuit's recent decision in *Ecological Rights Foundation*<sup>26</sup> confirms the prudence of such an interpretative approach. In rejecting the plaintiff's argument that stormwater runoff containing wood preservatives from utility poles should be regulated under the CWA as a "discharge associated with industrial activity," the Ninth Circuit cautioned that statutes should not be interpreted in a manner that leads to "absurd results." Accepting an argument that utility poles are "conveyances that are both 'used for collecting and conveying storm water' and 'directly related to manufacturing, processing or raw materials storage areas at an industrial plant,'" would arguably mean that "playground equipment, bike racks, mailboxes, traffic lights, billboards, and street signs—indeed, anything that might contaminate stormwater" would be regulated under the CWA. The Ninth Circuit reasonably declined to endorse such an expansive interpretation of the scope of CWA regulation, consistent with congressional intent and EPA policy.<sup>27</sup>

## II. A Call for a More Focused Analytical Approach

The San Diego Water Board's determination in May 2011 that occasional public fireworks displays are now subject to NPDES permitting requirements presents a slippery slope of endless regulation with potentially absurd results. The next regulatory extension of the CWA could require commercial or military aircraft flying over an ocean, lake, or river to apply for an NPDES permit because its engines combust fuel and discharge particulates into the water. A surfer could violate the CWA by discarding wax into the ocean, or community members could be in violation for cleaning bird droppings near water bodies.<sup>28</sup>

These sources produce far more cumulative "pollutants" and occur infinitely more frequently than a 25-minute annual Independence Day fireworks display; yet regulatory agencies correctly have not seen fit to regulate any of these dischargers under the CWA. Regulatory agencies no doubt have recognized that they lack the legal authority to do so and that such regulation would result in an endless permitting and litigation fiasco. But the same principles dictate

that occasional fireworks displays and Fourth of July celebrations also fall outside of the CWA, as they had for 40 years until the San Diego Water Board's 2011 action.

That is not to say that no circumstances exist where the discharge of materials into the air over water could constitute a discharge subject to the CWA. For example, courts reasonably have held that the year-after-year deliberate bombing of coastal and water-based targets and disposal of millions of pounds of military munitions into the ocean surrounding Vieques Island is subject to the Act.<sup>29</sup> But this is readily distinguishable from occasional fireworks displays, because long-term military operations by military vessels and aircraft involve the systematic conveyance of pollutants to water and are certainly much closer to the type of activity that Congress intended to regulate as point sources under the CWA.<sup>30</sup>

Also distinguishable are frequently occurring commercial fireworks displays, such as those nightly summer shows at SeaWorld San Diego, which averages between 110 and 120 shows per year at a single location in a small bay.<sup>31</sup> The typical SeaWorld show launches over 200 pounds of explosive weight into the air, while its special and major events involve almost 1,000 pounds of explosive weight.<sup>32</sup> In contrast to annual community fireworks displays, the SeaWorld events are frequent, commercial, and systematized in a way that CWA regulation is not necessarily unreasonable or in conflict with legislative intent. Perhaps for this reason, SeaWorld San Diego voluntarily sought to include its nightly fireworks shows in an existing NPDES permit for an array of SeaWorld operational discharges to Mission Bay.<sup>33</sup>

There is a way to distinguish between activities that may or may not require an NPDES permit: Start with the "deliberate and systematic" conveyance test fashioned by federal courts,<sup>34</sup> and then weigh Congress' intent to regulate industrial, municipal, or commercial discharges, rather than nonsystematic, individual activity. This combination provides a relatively clear, limited, and reasonable line between regulated and unregulated activity. Under this approach, only the handful of commercially run fireworks

26. No. 11-16042, 2013 U.S. App. LEXIS 6692, \*28 (9th Cir. Apr. 3, 2013) (citing and quoting *United States v. Tatoyan*, 474 F.3d 1174, 1181 (9th Cir. 2007)).

27. *Id.* at 28 ("Absent guidance from EPA that says otherwise, regulation of stormwater runoff from such commonplace things would seem to run counter to EPA's measured regulation of stormwater discharges under [federal law and regulations], and to our practice of reading statutes to 'avoid . . . absurd results.'") (citations omitted); see also *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 185 L. Ed. 2d 447, 43 ELR 20062 (2013) (stormwater runoff from logging roads not "associated with industrial activity").

28. For example, some have even suggested that an individual who sweeps bird droppings into the ocean with a push broom is in violation of the CWA. See Mike Slater, *Why I Cleaned the Bird Poop From La Jolla Cove*, SAN DIEGO ROSTRA (Dec. 4, 2012), available at <http://sdrostra.com/?p=32151>. The San Diego Water Board quite reasonably declined to initiate an enforcement action. See Deborah S. Brennan, *Radio Host Calls for Poop Patrols at La Jolla Cove*, UNION-TRIB. SAN DIEGO (Dec. 4, 2012), available at <http://www.utsandiego.com/news/2012/dec/04/radio-host-calls-for-poop-patrols-at-la-jolla-cove/>.

29. *E.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 307, 12 ELR 20538 (1982).

30. See 33 U.S.C. §1362(6) (definition of pollutant includes munitions), (14) (definition of point source includes "vessel or other floating craft"). See also *Stone v. Naperville Park Dist.*, 38 F. Supp. 2d 651, 655 (N.D. Ill. 1999) (firing range is a point source because it involved concentrated shooting activity from a number of individuals firing from a few specific points in a specific direction to a specific location, transforming the range from mere "place" to a systematic conveyance of shot and target fragments).

31. San Diego Fireworks General NPDES Permit, *supra* note 3, at F-36.

32. *Id.* at F-37.

33. See Addendum No. 1 to Order R9-2005-0091, NPDES No. CA0107336 for the Discharge of Waste From SeaWorld Aerial Fireworks Displays to San Diego Mission Bay San Diego. SeaWorld San Diego was automatically enrolled in the new general permit, which superseded the original permit as to SeaWorld San Diego fireworks. San Diego Fireworks General NPDES Permit, *supra* note 3, at 24-25, F-44.

34. See *Hudson Riverkeeper Fund*, 917 F. Supp. at 257 (citing *Plaza Health Labs, Inc.*, 3 F.3d at 646).

shows on the scale of SeaWorld San Diego would qualify, if adverse water quality impacts could be shown.<sup>35</sup>

Rather than applying this (or another specific) analytical framework, the San Diego Water Board's general permit for all fireworks regardless of purpose or frequency is noteworthy for its failure to: (1) define squarely the "point sources" that are regulated; and (2) articulate a basis for determining that fireworks constitute a point source under federal law. What type of fireworks display would qualify as a point source? A coastal land-based display where the fireworks are designed to explode over water but where wind conditions make it probable that debris will fall on land? Or a coastal land-based display where the fireworks explode over land but wind conditions make it likely that some debris will fall into the water? In either case, what must the probability of debris reaching the water be? And how frequently must a display be conducted?

Notably, the San Diego Water Board already provides a permit exemption for inland fireworks<sup>36</sup>; yet at some ill-defined location near the coast, this otherwise-exempt activity instantly becomes a regulated point source. It may take future citizen suits to shape that unanswered jurisdictional question because the general permit also does not explain how far inland a theoretical "point source" must be launched before it becomes a nonregulated fireworks display, or address any of the other issues raised above. These are the type of fundamental questions that need to be considered to evaluate whether a fireworks display is sufficiently deliberate and systematic, and on a scale similar to SeaWorld's nightly summer shows, such that it could be construed as a "conveyance" of pollutants under the CWA. Under existing law, the San Diego Water Board overreached and does not have jurisdictional authority over constitutionally protected, once-per-year Fourth of July fireworks shows, regardless of location. Today, however, Fourth of July shows in San Diego are subject to costly annual permitting and citizen suits from politically motivated opponents.

### III. Conclusion

One starts from the basic proposition that fireworks displays are not regulated point source discharges. The one

exception is SeaWorld San Diego and its nightly commercial shows, only because it volunteered to regulate itself as part of a facilitywide NPDES permit. But even if SeaWorld sets the benchmark, it is exceptional—based upon the frequency of the commercial displays, the amount of pyrotechnics used, the specific mechanics of how the displays are conducted, and how close the displays are to a closed and shallow water body such as Mission Bay.

In considering whether other activities are subject to point source regulation, the Second Circuit's "deliberate and systematic conveyance" test properly limits the interpretation of "point source" to something more specific and discrete than "any source." This test preserves congressional intent to focus on industrial or municipal discharges and avoid the unreasonable regulation of millions of individuals engaging in normal, everyday, and constitutionally protected activity that is not harming the environment.

The manner in which the CWA has in San Diego been stretched beyond the scope of its original regulatory mandate warrants close scrutiny by the public, the California State Water Resources Control Board,<sup>37</sup> and, perhaps, ultimately, the courts. Regulators should not be distracted by insignificant, if not nonexistent, threats to water quality. Regulators also should not spend their scarce time and resources—taxpayer-funded assets—regulating problems that simply do not exist. Although the San Diego Water Board may not have had the authority to regulate these displays, it must be noted that it was receptive to many concerns that were expressed during the permitting process and responded appropriately in many instances, including by acknowledging that small-scale fireworks displays "pose no significant threat to water quality" and declining to impose costly water quality monitoring that would have forced the widespread cancellation of many community fireworks displays in the San Diego area. But the general NPDES permit, its \$1,500 annual fee, and threatened citizen suit litigation have already led to canceled shows.<sup>38</sup> It sets a dangerous precedent that may have unreasonable and unintended consequences—as it could provide a foundation for other regulatory bodies to impose even more severe requirements that reach beyond the CWA mandate and intrude into the regular activities of ordinary citizens.

35. The fireworks shows at SeaWorld Orlando, Florida, are not subject to an NPDES permit.

36. SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD, CONDITION WAIVER NO. 11—AERIALY DISCHARGED WASTES OVER LAND (Nov. 4, 2008), available at [http://www.waterboards.ca.gov/rwqcb9/board\\_decisions/waivers/docs/Conditional\\_Waiver\\_11.pdf](http://www.waterboards.ca.gov/rwqcb9/board_decisions/waivers/docs/Conditional_Waiver_11.pdf).

37. A petition for review to the State Water Board was filed on May 31, 2011, by the National Fireworks Association and Fireworks & Stage FX America, Inc., challenging the 2011 general NPDES permit on the grounds, among others, that fireworks displays are not point source discharges subject to regulation under the CWA. The State Board has not yet acted on the petition, showing no urgency in taking on this important public policy issue.

38. See, e.g., John Pilch, *Fireworks Cancelled! Lawsuits Force Cancellation of Lake Murray Fourth of July Fireworks*, MISSION TIMES COURIER (May 1, 2012) (discussing cancellation of 2012 Lake Murray Fourth of July fireworks show because of continuing litigation challenging various Independence Day fireworks displays in San Diego).