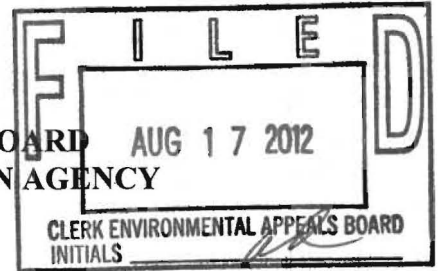


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)

San Pedro Forklift)

Docket No. CWA-09-2009-0906)
_____)

CWA Appeal No. 12-02

ORDER DIRECTING SUPPLEMENTAL BRIEFING

On April 27, 2012, Region 9 (“Region”) of the U.S. Environmental Protection Agency (“EPA” or “Agency”), Complainant below, appealed an Initial Decision issued in the above-captioned case by Administrative Law Judge Barbara A. Gunning. On June 20, 2012, San Pedro Forklift (“San Pedro”), Respondent below, filed a response to the Region’s appeal and requested oral argument. On July 3, 2012, the Region filed a reply to San Pedro’s response. Upon examination of these filings and portions of the administrative record, the Environmental Appeals Board (“Board”) has determined that supplemental briefing would be helpful in the decisionmaking process and that it will defer its decision on whether to hold oral argument until it receives additional briefing.

Accordingly, the Board hereby directs the Region to submit a supplemental brief that addresses specific questions of interest to the Board, as follows.¹

- (1) Congressional Intent. Identify and provide copies of any legislative history explaining Congress’ intended meaning of the statutory term “discharge associated with industrial

¹ The Board’s identification of these issues should not be interpreted as suggesting that the Board has made any determinations on the merits regarding any of the facts, issues, or legal matters relating to the Region’s appeal.

activity” in Clean Water Act § 402(p)(3)(A), 33 U.S.C. § 1342(p)(3)(A). Identify and provide copies of any legislative history explaining whether Congress intended to require a certain number of incidences for a certain action to qualify as “industrial activity” (such as a certain quantity or frequency of “maintenance” in a “vehicle maintenance shop” or a certain quantity or frequency of “cleaning” in “equipment cleaning operations”).

(2) Regulatory Intent.

- (a) Identify and provide copies of any regulatory history (e.g., final rules, their preambles, and related guidance documents), including date, explaining EPA’s intended meaning of the regulatory terms “storm water associated with industrial activity,” “vehicle maintenance shop,” and “equipment cleaning operations,” as used in 40 C.F.R. § 122.26(b)(14) and 122.26(b)(14)(viii). Identify and provide copies of any regulatory history explaining whether EPA intended to require a certain number of incidences for a certain action to qualify as “industrial activity,” “vehicle maintenance” in a “shop,” or “equipment cleaning operations.”
- (b) Identify and provide copies of any regulatory history, including date, explaining EPA’s intended definition of the following discrete legal terms, which are used in 40 C.F.R. § 122.26(b)(14)(viii): (a) “vehicle,” in the term “vehicle maintenance shop”; (b) “equipment,” in the term “equipment cleaning operations”; and (c) “cleaning,” in the term “equipment cleaning operations.”
- (c) Specify whether, as a matter of law, forklifts, yard goats, trucks, shipping or storage containers, and roll-off bins (of the type used at San Pedro’s facility) are “vehicles” and/or “equipment” under 40 C.F.R. § 122.26(b)(14)(viii). Specify

further whether, as a matter of law, rinsing or spraying equipment with water constitutes “cleaning” under 40 C.F.R. § 122.26(b)(14)(viii) or whether some form of additional cleaning agent or action is required to qualify as “cleaning.”

- (3) Nontransient Activities. Explain the applicability, if any, to the facts of this case of the example taken from EPA’s 1992 Question and Answer Document, in which EPA stated that “[o]nly nontransient vehicle maintenance shops are included in the transportation category,” and thus repairs along a railroad system (including, presumably, a single, one-time repair, regardless of magnitude) are *not regulated* as “vehicle maintenance” in a “shop.” See Office of Water, U.S. Environmental Protection Agency, EPA Doc. No. 833-F-93-002, *NPDES Storm Water Program, Question and Answer Document Volume 1*, at 12 (Mar. 1992) (Question 32) [hereinafter Q&A Doc.]. Discuss whether any similar kinds of examples exist for “equipment cleaning operations.”
- (4) Accumulation of Pollutants. Address whether the concept of “accumulation” should be factored into interpretations of the regulatory terms “vehicle maintenance shop” and “equipment cleaning operations.” For instance, the notion of pollutants “accumulating” in discrete, nontransient locations is suggested in EPA’s discussion of industrial storm water discharges in the preamble to the final rule and EPA’s Q&A Document. See, e.g., 55 Fed. Reg. 47,990, 48,009 (Nov. 16, 1990); Q&A Doc. at 12 (Questions 32, 34). Include citations to and copies of relevant statutory, regulatory, and/or common law authority. Also, if pollutant *accumulation* in a *nontransient area* were adopted as relevant factors for assessing whether a transportation facility has a “vehicle maintenance

shop” or “equipment cleaning operations,” explain the implications that would flow therefrom.

- (5) Other Avenues of Regulation. Explain whether EPA would have any remedies or causes of action in a case where a transportation facility (with one of the SIC codes listed in 40 C.F.R. § 122.26(b)(14)(viii)) engaged in a single act of maintenance or cleaning (and no others), and that single act resulted in a significant quantity of pollutants being discharged into a municipal separate storm sewer system. Assume for purposes of this question that the facility is not regulated under the industrial storm water program (i.e., it does not have a vehicle maintenance shop, equipment cleaning operations, or airport deicing operations).

The Region must file its supplemental on or before Friday, September 21, 2012, addressing each of the foregoing elements. San Pedro may file a reply to this supplemental brief, if it so desires, on or before Friday, October 5, 2012. In preparing these briefs, the parties need not repeat arguments or submit documents already presented to the Board. They should, however, respond as completely as possible to the specific items listed above.

In addressing the questions listed above, the Region is directed to consult with the Agency’s Office of General Counsel and Office of Water to ensure that those offices review and concur in the contents of the supplemental brief. The Board encourages the parties to support all statements in their supplemental briefs with references to relevant legal authorities, including, as appropriate, program-specific interpretative documents not presently in the administrative record for this case but of which the Board could take official administrative notice. *See In re Gen. Motors Auto. – N. Am.*, RCRA (3008) Appeal No. 06-02, slip op. at 37 (June 20, 2008),

14 E.A.D. ___ (taking official notice of regulation cited for first time at oral argument); *In re Cutler*, 11 E.A.D. 622, 650-51 (EAB 2004) (ruling that information in the public domain is subject to official notice by the Board); *see also* 40 C.F.R. § 22.22(f) (providing that “[o]fficial notice may be taken of any matter [that] can be judicially noticed in the [f]ederal courts and of other facts within the specialized knowledge and experience of the Agency”).

After receipt and review of the supplemental brief(s), the Board will determine whether to grant oral argument. If it decides such argument is warranted, the Board will issue another order specifying the date, time, subject matter, and other pertinent details for the oral argument, including opportunities for participation via video-conferencing equipment.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: August 17, 2012

By: Leslye M. Fraser

Leslye M. Fraser
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Directing Supplemental Briefing** in the matter of *San Pedro Forklift*, CWA Appeal No. 12-02, were sent to the following persons in the manner indicated:

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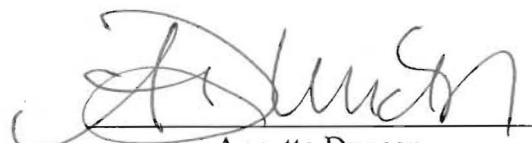
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Date: AUG 17 2012



Annette Duncan
Secretary