ORIGINAL

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

CWA Appeal No. 12-02

In The Matter Of:

San Pedro Forklift
San Pedro, California

Docket No. CWA-09-2009-0006 (Region 9)

Appeal From The Initial Decision
of the Presiding Officer, Administrative Law Judge
Barbara Gunning, Dated January 27, 2012

RESPONDENT'S BRIEF

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I.

INTRODUCTION AND STATEMENT OF FACTS

On September 29, 2009, the Environmental Protection Agency Region IX (hereinafter "EPA or Appellant") filed an Administrative Complaint against San Pedro Forklift (hereinafter "Respondent") alleging in three counts that Respondent failed to develop and implement an adequate storm water pollution prevention plan; failed to submit an NOI to the State of California; and discharged from its facility in Long Beach, California storm water without a permit in violation of *Section 301(a)* of the *Clean Water Act* 33 U.S.C. § 1331(a).

In *Count I*, the EPA alleged that between October 1, 2004 and December 24, 2007, Respondent was responsible for 57 incidents of polluting the Los Angeles Inter-Harbor and the Pacific Ocean[1] due to run-offs from its property which allegedly contained pollutants.

In *Count II*, the EPA alleged that Respondent failed to submit an NOI; and in *Count III*, alleged that Respondent failed to comply with the

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[1] Even though Plaintiff made this allegation, the actual case and evidence put on by Plaintiff pertained solely to alleged discharges into the Dominguez Channel and the purported harm to the marine life therein. No evidence whatsoever of discharge into the Pacific Ocean or Los Angeles Harbor exists in the Administrative Record.

general permit requirements to develop an adequate storm water pollution prevention plan and monitoring system.

As a result of these alleged violations, the EPA sought an administrative penalty in the amount of $177,500 against San Pedro Forklift.

Since the inception, Respondent has maintained that it was not and is not required to have a storm water permit because Respondent conducts no activities that come within the regulatory jurisdiction of the EPA under the *Clean Water Act*. Moreover, the SIC Code most applicable to Respondent's operations (no. 4213) does not require a Storm Water Permit under the Act. Nevertheless, and solely out of a desire to avoid the costs and undue consumption of time that this litigation has required, Respondent, without any legal obligation to do so, filed an NOI and promulgated a storm water program.

Despite having fully complied with the EPA's pre-litigation demands for an NOI, the EPA nevertheless proceeded with the filing and prosecution of this action without any factual or legal basis as determined by Administrative Law Judge Barbara A. Gunning ("the Presiding Officer").

The gravamen of Appellant's case has now shifted from Respondent

being a discharger of pollutants to being the operator of a "vehicle maintenance shop" in a futile attempt to bring Respondent within the ambit of *40 CFR § 122.26(b)(14)(viii)*. However, Appellant offered no evidence of the existence of such a vehicle maintenance shop and attempted to unsuccessfully argue to the Presiding Officer that the EPA investigator's observation of water adjacent to a forklift on the loading dock, constituted "evidence of equipment washing or maintenance activities."

Respondent explained that the water in question was actually condensation which had spilled out onto the loading dock when the doors to a refrigerated produce container were opened. (R.T. 192-194).

Plain and simple, the EPA failed to meet its burden of proof and the Presiding Officer appropriately determined that San Pedro Forklift did not have a vehicle maintenance shop or engage in equipment cleaning operations so as to come within SIC code that require a storm water permit.

On April 7, 2011, the California Regional Water Quality Control Board approved Respondent's Notice of Termination (NOT) under the California *Statewide Storm Water General Permit*. On May 26, 2011 and June 13, 2011, Respondent filed motions to augment the record and request judicial notice of the NOT. The Presiding Officer did not issue a ruling on

these requests, and it is unknown if the Presiding Officer took into consideration the NOT in reaching her Initial Decision. The NOT supports Respondent's position that it was never required to obtain a storm water permit and that its activities do not come within the regulatory ambit of the *Clean Water Act.*

Although the Presiding Officer essentially based her *Initial Decision* that the EPA had not met its burden of proof to establish its jurisdiction under *40 CFR § 122.26(b)(14)(viii)* upon the weight and quality of the EPA's evidence, Respondent presented numerous jurisdictional arguments that would preclude regulation under the *Clean Water Act*, none of which were addressed in the *Initial Decision.* Respondent will reassert these arguments in the event that the Board does not agree with the Presiding Officer's factual determinations.

Finally, the case presented by the EPA can best be described as "virtual," because it is based entirely upon theoretical assumptions unsupported by any evidence that Respondent has actually discharged any pollutant whatsoever. Similarly, the EPA's penalty calculation was also based upon a theoretical model supported entirely by unproven assumptions as opposed to facts and evidence. Although not addressed by the Presiding

Officer in her *Initial Decision*, Respondent contends that this type of enforcement action constitutes "trial by supposition," and violates basic due process. It is also the type of arbitrary and capricious enforcement action which the United States Supreme Court recently disapproved of in *Sackett v. Environmental Protection Agency* (2012) 132 S.Ct. 1367; 182 L.82d 367.

Unchastened by the complete rejection of their patently unmeritorious case, Appellant unreasonably persists in the unjustified prosecution of this matter before this Board.

II.

STANDARD OF REVIEW

Appellant asserts that the standard of review pursuant to *40 C.F.R. § 2230(f)* is "*de novo*." However, the words, "*de novo*" do not appear in *40 C.F.R. § 2230(f)*. Nevertheless, numerous Environmental Appeals Board decisions have adopted the standard formulation that "an appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule, and shall adopt, modify or set aside the findings of facts and conclusions of law or discretion contained in the decision or order being

reviewed ..." *In Re: Coastwood Preserving, Inc.* (2003) EPA App. LEXIS 4; *In Re: Martex Farms, S.E.* (2008) EPA App. LEXIS 8.

In exercising its *de novo* review, the board will typically grant deference to an Administrative Law Judge's determinations regarding witness credibility and the factual findings based thereon because the Board recognizes that the Administrative Law Judge has "the opportunity to observe the witness testify and to evaluate their credibility." *In Re: Echevarria* (EAB 1994) 5 E.A.D. 626, 639.

Similarly, the weight and inferences drawn from the evidence as to matters in controversy which must be established by a preponderance of the evidence are entitled to deference. *40 C.F.R. § 22.24(b)*; *In Re: Antkiewicz* (EAB 1999) 8 E.A.D. 218, 227.

Although described as *de novo*, by applying the required deference to the Presiding Officer's factual determinations, the standard of review becomes in effect one of "abuse of discretion," as it pertains to non-legal determinations.

III.

ARGUMENT

A. The EPA Lacks Jurisdiction over Respondent Under the *Clean Water Act.*

No where in *Appellant's Brief* or the *Initial Decision* is there any discussion of the jurisdictional predicate to regulation under the *Clean Water Act,* and the undisputed fact that the alleged storm water discharges by Respondent were not into navigable waters as required by *Section 301* of the *Clean Water Act.*

In fact, the alleged discharges occurred into what is unquestionably a concrete flood control channel. *Section 301* of the *Clean Water Act* prohibits "any addition of any pollutant to navigable waters from any point source." *33 U.S.C. § 1311, 1362(12).* The term "navigable waters" is defined as "the waters of the United States, including the territorial seas." *33 U.S.C. § 1362(7).* Congress intended to grant EPA authority over certain waters "that were or had been navigable in fact or which could reasonably be so made." *Solid Waste Agency of Northern Cook County v. U.S.A.* (2001) 531 U.S. 1359, 172.

A flood control channel, such as the Dominguez Channel into which

Respondent is alleged to have discharged, does not incorporate any notion of navigability as required by the *Clean Water Act*. It was the intent of Congress to limit the application of the *Clean Water Act* to "navigable waters." See *Clean Water Act* Legislative History, volume I at 178.

At the administrative trial, not a single EPA witness testified that the Dominguez Channel is a navigable water, nor was there any evidence put forth that would establish this jurisdictional prerequisite.

It is not by accident that Appellant failed or refused to offer even a single photograph of the Dominguez Channel because any such photograph would depict a concrete flood control conduit that is obviously not navigable. Nevertheless, the Los Angeles County Flood Control District maintains a website at http://ladpw.org/wmd/watershed/dc/photos/watershed.cfm which provides a "virtual tour of the Dominguez Channel" consisting of 11 photographs depicting the Channel at various points along its continuum from beginning to end. On June 8, 2011, Respondent filed a pleading entitled: "*Respondent's Supplemental Motion to Augment Administrative Record or in the alternative, Request for Judicial Notice of Official Photographs of the Dominguez Channel.*" Although no ruling was issued on Respondent's

request, it is presumed that the Presiding Officer read the request and viewed the photographs submitted therein, which would lead to the inescapable conclusion that the Domginuez Channel is not a "navigable water" and that jurisdiction under *Section 301* of the *Clean Water Act* is clearly lacking.

If Congress had intended for the *Clean Water Act* to apply to flood control channels, which are no more than conduits to collect run-off, it would have used the words "all waters of the United States." The fact that Congress limited the application of the *Act* to only "navigable waters," clearly manifested an intent not to regulate the vast assortments of waters which are not navigable. In *Sackett, supra*, a unanimous Supreme Court rejected the EPA's expansive view of its regulatory jurisdiction under the *Clean Water Act* in which it attempted to exert jurisdiction over prospected "wetlands."

Respondent fully expected the EPA to advance the argument that because the Dominguez Channel empties into the Port of Los Angeles, which is undisputably navigable water, that any discharge into the Dominguez Channel would indirectly constitute a discharge of pollution into a navigable water and therefore be subject to regulation under the

Clean Water Act. Although Respondent would have vigorously contested this theory because the argument runs contrary to the legislative history that only discharges that are made directly into navigable waters are subject to regulation, Appellant unexplicably disavowed this approach and instead based its entire case on the theory that Respondent had caused harm to the marine life, not in the navigable waters of the Port of Los Angeles, but inside the Dominguez Channel "estuary."

The EPA's own expert, Peter Kozelka's testimony leaves little doubt that this action is an attempt to regulate discharges that purportedly affect the aquatic life within the non-navigable waters of the Dominguez Channel and that the civil penalty sought to be imposed against Respondent was impermissibly based solely for this alleged harm. Kozelka testified as follows:

> "Q. Just to be clear. I'm looking at this map. This estuary extends quite aways up, inland; isn't that correct.
>
> A. Yes; it does. I don't know how far.
>
> Q. I see a scale there on the map. It looks like it would be roughly over four miles. Well over four miles.
>
> A. I would agree with that.

Q. In an estuary system, again, it's a mixing of salt and fresh water from the ocean; is that correct.

A. Yes; it's not exclusively fresh.

Q. What types of aquatic organisms might you imagine exist in an estuarine system, with salt water from the ocean?

[Objections]

Mr. Campbell: *Your Honor, the water at issue is an estuary. So he is going to be testifying as to the impact of water quality on a water, as described in the pre-hearing exchange, which is an estuary.*"

[R.T. 734, Lines 12-22; 735, Lines 1-5; 737, Lines 2-6]

A careful reading of Kozelka's testimony, along with the comments of EPA counsel Mr. Campbell, clearly demonstrate that the very specific water which is the subject of this action is not the navigable water in the Port of Los Angeles or the Pacific Ocean, but rather the water in an inland concrete storm control channel that clearly falls outside of the *Act*.

Having failed to establish the jurisdictional prerequisite that Respondent directly discharged a pollutant into a navigable water of the United States, Appellant was without jurisdiction to regulate Respondent and require that it obtain a storm water permit and to bring this enforcement

action.

Nevertheless, as noted in Justice Alito's concurring opinion in *Sackett, supra*

> "... the combination of the uncertain reach of the *Clean Water Act* and the draconian penalties imposed for the sort of violations alleged in this case, still leaves most property owners with little practical alternatives but to dance to the EPA's tune."

Therefore, out of an abundance of caution and in a good faith effort to avoid this protracted litigation, Respondent complied with the EPA's demand that it obtain a storm water permit. Instead of putting the matter to rest, the EPA seized upon the opportunity to impose the very type of "draconian" penalties referred to by Justice Alito for discharges occurring prior to Respondent unnecessarily obtaining the Storm Water Permit.

Appellant adamantly refused to put on any evidence necessary to establish the jurisdictional predicate for regulation under the *Clean Water Act*, i.e. that the Dominguez Channel is a navigable water or to in anyway discuss the issue in either its *Brief in Support of Findings of Fact and Conclusions of Law*, submitted in the administrative trial, as well as its *Opening Brief* on appeal before this Board.

Appellant apparently presumes that jurisdiction under the *Act* exists, which it does not, and the administrative record is completely devoid of any evidence that would establish the EPA's regulatory jurisdiction under the *Clean Water Act*. Moreover, Appellant does not provide any citation to the record in its Brief and is obviously unable to do so. Accordingly, it is deemed to have conceded this issue. *Navelliance v. Sketten* (9th Cir. 2001) 262 F.3d 923, 948-949 [issues not supported by argument or citations to authorities and supporting documents in the record are waived].

The fact that the presiding officer dismissed the EPA's case based upon a finding that Respondent's activities do not come within an SIC code that requires a storm water permit is an issue that although decided in Respondent's favor, is moot given the absence of the jurisdictional predicate to regulation.

B. The EPA's Case Lacked a Factual Basis and was Based Upon an Impermissible Presumption that Respondent had the "Potential" to Discharge Pollutants.

Appellant's case at the administrative hearing was completely devoid of any evidence that Respondent actually discharged a single pollutant into the Dominguez Channel and/or that such pollutant reached navigable water.

Instead, Appellant's case is based entirely on a presumption that

Respondent discharged various unidentified and unquantified pollutants, which the EPA's chief investigator Amy Miller readily admitted. [R.T. 223, 3; RT 256, 16-17]

Ms. Miller stated:

> "That in and of itself this something I'm trying to capture with this inspection which is to identify different *potential* pollutant sources and that those different pollutant sources need to be addressed."

[R.T. 306, Lines 18-22; 307, Line 1]

The fact that the EPA's case relies solely on the *potential* for pollution, is further established by testimony which Ms. Miller gave regarding a battery which she saw on Respondent's premises:

> "Q. Okay. So again, you don't know how long that battery was there?
>
> A. No.
>
> Q. Or how long it intended to remain, correct?
>
> A. No.
>
> Q. **But the mere fact that it's there at all, in your mind, is a violation of the *Clean Water Act*, correct?**
>
> A. It's one piece of many things that I looked at during the inspection to look at the totality of the facility and look at the pollution sources.

> Obviously, when we order the facility to come into compliance, we ask them to develop a storm water pollution prevention plan, look at all their *potential* pollutant sources."

[R.T. 307, Lines 20-22; 308, Lines 1-14]

There is no provision in the *Clean Water Act* itself, or the legislative history which manifests a congressional intent that a violation of the *Clean Water Act* can be based upon the potential or theoretical discharge of pollutants as opposed to the actual discharge.

Moreover, there is no provision in the *Act* which allows for the use of a presumption as Appellant has attempted to do here. The use of such a presumption is impermissible because federal agencies must establish their jurisdiction before exercising regulatory authority. *Phillips v. Fildelgo Island Tacking Company* (9th Cir. 1955) 230 F.2d 638, 640 "administrative bodies do not enjoy a presumption of lawful exercise of authority, jurisdiction of the subject matter and person must be pleaded and proved." *Engine Manufacturers Association v. EPA* (D.C. Cir. 1996) 88 F. 3d 1075, 1097.

The EPA must make a jurisdictional determination before it can exercise regulatory jurisdiction. In *Michigan v. EPA* (D.C. Cir. 2001) 268

F.3d 1076, the petitioners successfully challenged a regulation expanding the EPA's permitting authority under the *Clean Water Act*. Although the EPA has a mandate to regulate waters in "Indian country" and at 1084, the agency had promulgated a rule extending that power to "areas for which the EPA believes the Indian country status is in question." *Id.* at 1080. The EPA "presumed" its authority over these in question" lands, treating them as "Indian country" absent some affirmative showing to the contrary. Id. at 1082, 1086-1087. The Court of Appeal voided this presumption as a derogation that the EPA's duty to determine whether it has jurisdiction for exercising its regulatory authority. The court emphasized that "agency authority may not be lighting presumed" and that requiring an agency to establish its authority before regulating is essential, lest the agency "have a blank check to expand its own jurisdiction." *Id.* at 1082. 1084.

Appellant's use of a presumption without actual proof that Respondent discharged pollutants because it "had a potential to discharge," is equally improper. Like the regulators in *Michigan*, Appellant seeks to expand its regulatory sphere by forcing a private party to prove a negative and overcome a presumption, thereby not only impermissibly asserting regulatory jurisdiction over Respondent, but also shifting the burden of

proof by requiring Respondent to overcome the presumption by demonstrating that it did not discharge any pollutants.

There is no support for this *ultra viries* action by the EPA in the *Clean Water Act* itself, the legislative history, or any federal appellate decision. Not surprisingly, this subject is completely avoided in Appellant's Brief with the obvious hope that this Board will assume that jurisdiction under the *Clean Water Act* exists based upon "leap of faith" alone. All of the foregoing notwithstanding, Respondent's approved NOT constitutes evidence that Respondent never had the "potential to discharge pollutants" and thus effectively rebuts Appellant's presumption.

C. Appellant's presumption fails under the "arbitrary and capricious" standard.

Review under the "arbitrary and capricious" standard requires courts to "carefully probe into the agency's actions." *Pearles v. Sullivan* (2nd Cir. 1991) 948 F.2d 1348, 1353; See also *Blassingame v. Secretary of the Navy* (2nd Cir. 1989) 866 F.2d 556, 559. The courts must insure that agency actions are supported by "substantial evidence." *BFI Waste Systems of North America v. FAA* (D.C. Cir. 2002) 293 F.3d 527, 532. Agency determinations are "arbitrary and capricious" if they are not supported by

substantial evidence in the record as a whole.

An agency "presumption that causes a shift in the burden of production" is arbitrary and capricious unless the "circumstances given rise to the presumption make it more likely than not that the presumed facts exist. *National Mining Association v. Babbitt* (D.C. Cir. 1999) 172 F.3d 906, 910. The use of such a presumption "is only permissible when proof of one fact renders the existence of another fact so probable that it is sensible and time saving to assume the truth of the inferred fact until the adversary disproves it." *Id.* at 912. See also *NLRB v. Baptist Hospital, Inc.* (1979) 442 U.S. 773, 787, 790 (court strike down NLRB presumption that lack substantial evidence in the records to support it. Recognizing that agency presumptions must rest on a sound factual connection between the proved and inferred facts). For these reasons, Appellant's use of the presumption also fails under the arbitrary and capricious standard.

Moreover, the presumption cannot stand because it is effectively irrebuttable and constitutes a denial of due process. Respondent is unable to go back in time to perform run-off sampling to prove that it did not discharge any pollutants on the alleged 57 occasions. It is also fundamentally unfair to allow Complainant the benefit of a presumption

requiring absolutely no proof that Respondent discharged a single pollutant, but on the other hand required Respondent to show actual proof that it did not discharge pollutants in order to rebut the presumption.

The Presiding Officer recognizing these facts ruled as follows:

> "The rules of practice governing this proceeding state that "the complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the Complaint and that the relief sought is appropriate." *40 CFR § 22.24(a)* the standard of proof under the Rules of Practice is a preponderance of the evidence. *40 CFR § 22.24(b)*. Therefore, in this instance, Complainant has the burden of demonstrating by a preponderance of the evidence the Respondent's liability as to count 1, 2 and 3 of the *Complaint* and the appropriateness of its proposed penalty with respect to each count." Furthermore, *section 402(p)* of the *CWA* sets forth a general exemption for discharges composed entirely of storm water and specifically delineates certain exceptions to that general exception. The structure of this section leaves no doubt that Complainant also bears the burden of proving that Respondent's discharges, if any, were "industrial activity" as defined in the regulations. It does not fall to Respondent to prove an exception. *33 U.S.C. § 1342(p)*"

[*Initial Decision*, page 14]

D. Appellant Failed to Demonstrate by a Preponderance of the Evidence that Respondent had Either a "Vehicle Maintenance Shop" or engaged in "Equipment Cleaning Operations" for Purposes of *40 C.F.R. § 122.26(B)(14)(viii).*

1. The Assertion that Respondent had a Vehicle Maintenance Shop is a Complete Fabrication.

Just as Appellant failed to produce any evidence that Respondent discharged pollutants into the Dominguez Channel, not one scintilla of evidence exists in the administrative record to support the allegation that Respondent has a "vehicle maintenance shop" on the premises. Having put on a fatally flawed case in which regulatory jurisdiction is lacking, Appellant now attempts to "nit pick" the adverse factual findings against it.

The Presiding Officer described Respondent's premises as follows:

> "The facility itself is shaped like a curved sail with the eastern boundary running north-south, where the mass would be. C's int. ex.12 at 4. A rail spur runs along the eastern edge, it is paralleled by a covered loading docks; at each end of the loading dock are warehouses. *Id.* There are three other office out-buildings. Nearly the entire site consists of paved impervious surface. *Id.* at 2, 5; R's int. Ex 30; TR 93 at 1-12 ..."

[*Initial Decision*, Page 7]

The Presiding Officer's description of Respondent's premises does not indicate the presence of a maintenance shop.

Moreover, it appears that the allegation that Respondent had a vehicle maintenance shop was concocted by Appellant after the conclusion of the administrative hearing and raised for the first time in Complainant's *Brief in Support of Proposed Findings of Fact and Conclusions of Law* at pages 18-20 as an afterthought.

None of Appellant's witnesses who visited Respondent's premises, particularly lead investigator Amy Miller who visited twice, was able to describe what could reasonably be construed as a "vehicle maintenance shop." Moreover, Appellant's photographic exhibits admitted at the administrative trial do not depict anything on Respondent's premises that would remotely resemble a vehicle maintenance shop.

Respondent is a fumigator of produce and a transloader of cargo, particularly produce which comes to Respondent's facility in refrigerated containers. Respondent uses electrically powered forklifts to accomplish its transloading work, which are maintained by an outside contractor. [R.T. 1884; 19-22]. Absolutely no evidence was put forth by Appellant that maintenance of these forklifts was being performed on the San Pedro Forklift premises, let alone in a purported "vehicle maintenance shop."

Not surprisingly, the Presiding Officer correctly concluded that

Appellant failed to carry its burden of proof to demonstrate the existence of a vehicle maintenance shop and now asks this Board to render a strained and unreasonable interpretation of the regulation.

2. Appellant Failed to Carry its Burden of Proof that Respondent Engaged in "Equipment Cleaning Operations."

The assertion that Respondent engages in "equipment cleaning operations" is based upon the allegation made by EPA lead investigator Amy Miller that she purportedly saw someone hosing down a forklift on Respondent's loading dock. Although Respondent vigorously disputes the veracity of this assertion for numerous reasons, not the least of which is the fact that Ms. Miller had in her hand at all times, while on Respondent's premises a camera with which she took the voluminous photographs that were admitted into evidence, but remarkedly failed to photograph the alleged washing activity. The photograph she did take shows the alleged aftermath of the washing, depicting water on the loading dock [photographic *Exhibit No. 8*]. Interestingly, no water is visible on the forklift itself, nor is there water completely surrounding the forklift on the loading dock floor, which would be consistent with somebody using a hose to wash down the forklift.

Respondent's principal, Renato Balov, explained that the water shown on the loading dock was in fact condensation outflow when the container depicted at the right edge of photograph 8 was opened. Indeed, the water flow pattern begins at the container door and flows outward toward the forklift. Mr. Balov gave the following testimony:

> "Q. Do you know how it is then, in the absence of a hose, that there is water depicted on the dock on photo 8.
>
> A. Yes I do.
>
> Q. Can you tell us.
>
> A. There is a container parked right there.
>
> Q. Okay.
>
> A. So one of the main problems we have with containers is that they will have refrigeration unit on the front of them. And fresh fruits, we get a lot of damage when we receive them because when they start warming up the temp, they have to be at 40 plus degrees to fumigate. All that condensation and ice builds up on the outside. So when we open it, we've got all that fresh water that will sometimes come pouring out.

Q. Where's the edge of the water. Can you trace that with your finger on the loading dock.

A. Yes, it goes from the edge of the container door where it would come out, straight across in front of that forklift, and straight across to the other edge of the dock.

Q. Is the configuration of that water flow as depicted in photo 8 consistent with opening any container door of the type that you have described in condensed water exiting on to the loading dock.

A. Yes.

[R.T. 192-194]

Mr. Balov also testified that it would not be possible to wash the forklift depicted in photograph 8 with a hose as alleged by Ms. Miller because there were no water spigots anywhere in the vicinity.

"Q. Are there any water sources by where someone could attach a hose anywhere in photo 8 that is depicted?

A. No.

Q. Where is the nearest water spigot in relationship to this forklift here that is in photo 8?

A. That is close to the second fume warehouse. They would be maybe another thirty feet or

so towards the entrance of the warehouse."

[R.T. 1979]

Appellant asserts that the Presiding Officer found Ms. Miller's testimony to be "credible" on this subject. However, a careful reading of the *Initial Decision* makes clear that this is not the case. The exact words used by the Presiding Officer are as follows:

> "Nevertheless, even assuming a*rguendo* that Ms. Miller's observations are true and accurate, they do not support the inference that Respondent was engaged in equipment cleaning operations that would trigger the jurisdiction of *40 C.F.R. § 122.26(b)(14)(viii)*."

By using the words, "assuming *argumendo*" the Presiding Officer is implying that Ms. Miller's testimony was less than credible, but for purposes of the Presiding Officer's legal analysis, it would be accepted as true, in similar fashion as a court would accept as true the Plaintiff's factual allegations in a Complaint for purposes of ruling on a *F.R.C.P. 12(b)* motion. This does not mean however that the Presiding Officer found Ms. Miller's testimony to be factually credible.

Nevertheless, the Presiding Officer's legal conclusion that:

> "Neither of these sets of fact, independently or taken together, rise to the level of "equipment cleaning operations." The term "equipment cleaning operations" connotes a systematic process or "operation" that has a distinct commercial or organizational, though not necessarily profit-relevant, purpose for the regulated entity."

[*Initial Decision*, pg. 37]

The Presiding Officer's decision is not only supported by her well reasoned analysis, but also by the fact that the words "equipment cleaning operations" as found in the SIC Code are clearly stated in the plural, which obviously means more than one operation. In the context of commercial activity, "operations" as that term is commonly understood, denotes a deliberate or systematic methodology or activity, as opposed to a single random event.

At best, "assuming *arguendo*," that Ms. Miller observed an individual washing a forklift with a garden hose [an assertion which Respondent vigorously disputes], this does not constitute evidence of "equipment washing operations" because it reflects only one instance and there is absolutely no evidence that Respondent in the regular course of its business,

had promulgated or implemented "equipment cleaning operations."

Appellant's evidence on this subject matter was woefully inadequate and in essence asked the Presiding Officer to take a "leap of faith" and find that Respondent engaged in "equipment cleaning operations" based solely upon one highly disputed observation.

The Presiding Officer declined Appellant's invitation to take the "leap of faith," and there is absolutely no reason advanced in Appellant's Brief for this Board to do so either.

IV.

CONCLUSION

Appellant's case has failed at every level commencing with the inability to establish regulatory jurisdiction, to the complete absence of any proof that Respondent discharged a pollutant. Incredibly, Appellant does not discuss any of those issues, and instead asks this Board to reverse the Presiding Officer's decision and find true the completely manufactured allegations that Respondent maintains a vehicle maintenance shop and/or engages in "equipment cleaning operations," for which there is not a scintilla of evidence in the Administrative Record.

The decision of the Presiding Officer dismissing the EPA's *Complaint* in its entirety against Respondent should be affirmed.

V.

REQUEST FOR ORAL ARGUMENT

Respondent respectfully requests an opportunity to address the Board at oral argument if the Board determines that oral argument would be helpful.

DATED: June 15, 2012

Respectfully submitted,

FRANCESCHI LAW CORPORATION

BY: _____
Ernest J. Franceschi, Jr.
Attorney for Respondent,
SAN PEDRO FORKLIFT, INC.

CERTIFICATE OF SERVICE

I certify that the original and five copies of the foregoing **RESPONDING BRIEF** was sent via overnight mail (Fed Ex) to:

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

and that a true and correct copy of the said document was sent by First Class United States mail, addressed to the following:

Julia A. Jackson
Assistant Regional Counsel
U.S. EPA, Region 9 (ORC-2)
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San Francisco, CA 94105
Tel: (415) 972-3948/Fax: (415) 947-3570

Hon. Barbara A. Gunning
Office of Administrative Law Judges
U.S. EPA
401 M. Street, S.W.
Washington, D.C. 20460

Dated: June 15, 2012 By: _____
Ernest J. Franceschi, Jr.