THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

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| IN THE MATTER OF: | ) | CWA Appeal No. 12-02 |
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| San Pedro Forklift | ) | |
| | ) | NOTICE OF APPEAL |
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| DOCKET NO. CWA-09-2009-0006 | ) | |
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The Appellant, Director of the Water Division, United States Environmental Protection Agency ("EPA"), Region 9, for the Complainant in the proceedings below, by and through counsel, Julia Jackson, in accordance with 40 C.F.R. § 22.30(a), hereby submits this Notice of Appeal of the Initial Decision issued on January 27, 2012 by the Presiding Officer, Administrative Law Judge Barbara Gunning, in the above-referenced proceeding brought pursuant to the authority of Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), for the assessment of a civil penalty. Included herewith is the Appellant's Brief In Support of Notice of Appeal ("Brief").

Appellant does not specifically request an oral argument in

the matter, but if the Board determines that an oral argument would be helpful in deciding the issues raised in this appeal, then Appellant respectfully requests that, pursuant to 40 C.F.R. § 22.30(d), the Board set an appropriate time and place for oral argument.

Dated: April 27, 2012

Respectfully submitted,

Julia Jackson

Julia A. Jackson
Assistant Regional Counsel
U.S. EPA, Region IX

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

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CWA Appeal No. 12-02

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In The Matter Of:

San Pedro Forklift
San Pedro, California

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

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

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# APPELLANT'S APPEAL BRIEF

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# Table of Contents

# Table of Authorities

## I. INTRODUCTION

Appellant, the Director of the Water Division, United States Environmental Protection Agency Region 9 ("EPA" or "Appellant"), the Complainant in the proceedings below, by and through counsel, in accordance with 40 C.F.R. § 22.30(a), pursuant to the second extension granted on April 12, 2012, hereby submits its brief in support of the Notice Of Appeal filed on April 27, 2012. Appellant appeals from the Initial Decision dated January 27, 2012, issued by the Presiding Officer, Administrative Law Judge Barbara A. Gunning ("Presiding Officer"), in the above-referenced proceeding brought pursuant to Section 309(g) of the Clean Water Act("CWA" or "Act"), 33 U.S.C. § 1319(g), against Respondent San Pedro Forklift ("Appellee"), for the assessment of a civil penalty.

## II. STATEMENT OF ISSUES PRESENTED

Complainant seeks review of the Initial Decision under 40 C.F.R. § 22.30 of the Administrative Rules. Appellant seeks resolution of the following issue:

A. Whether the Presiding Officer erred in dismissing the Complaint for lack of jurisdiction under 40 C.F.R. § 122.26(b)(14)(viii) based on an interpretation of "associated with industrial activity" that unreasonably narrows the scope of the regulations.

## III. SUMMARY OF THE ARGUMENT

This administrative penalty action turns on whether Appellee's facility meets the definition of a regulated transportation facility under 40 C.F.R. § 122.26(b)(14)(viii). The evidence put on at hearing by the Appellant, as well as the findings of the Presiding Officer, established that the facility is classified under a relevant Standard Industrial Classification ("SIC") code and demonstrated the presence of both vehicle maintenance and equipment cleaning on-site. However, the Presiding Officer's novel interpretation of 40 C.F.R. § 122.26(b)(14)(viii) set thresholds for meeting these requirements that are inconsistent with the regulations as explained by the Agency. This interpretation is also counter to the goals of the storm water program and is not practical in its application.

Appellant submits that the term "vehicle maintenance shop" refers to the on-site location where vehicle maintenance activities take place, and it is these activities in the context of industrial facilities which triggers the applicability of the Phase I Storm Water Regulations. Appellant further submits transportation facilities which engage in equipment cleaning, regardless of volume, are subject to the jurisdiction of 40 C.F.R. § 122.26(b)(14)(viii). Appellant's position in this appeal is supported by the language and regulatory history of 40

C.F.R. § 122.26(b)(14)(viii), which demonstrate a concern with the areas at enumerated transportation facilities where vehicle maintenance and equipment cleaning activities take place.

Practical and policy considerations in the administration of the CWA also support reversing the Initial Decision. The Presiding Officer's narrow reading of 40 C.F.R. § 122.26(b)(14)(viii) subverts practical application of the storm water permit program, as the proposed narrative standards lack any metric to evaluate them, thus creating uncertainty for both the Agency and the regulated community. The Presiding Officer's interpretation also leads to illogical results for the regulation of pollutants in storm water discharges, as facilities with roofed maintenance structures will be required to implement storm water controls, while many facilities with outdoor vehicle maintenance will not.

Accordingly, Appellant respectfully requests that the Environmental Appeals Board: 1) reject the Presiding Officer's interpretation of 40 C.F.R. § 122.26(b)(14)(viii) set forth in the Initial Decision; 2) find that Appellee's activities were sufficient to meet the jurisdictional criteria set forth therein; and 3) reverse the Presiding Officer's dismissal of Appellant's Complaint and remand this matter to the Presiding Officer to conduct a determination of liability for all Counts alleged in the Complaint, and any consequent penalty assessment as well.

## IV. BACKGROUND

### A. Statutory and Regulatory Background

In the present case, EPA alleged violations of the Clean Water Act, as amended, 33 U.S.C. §§ 1251, et seq. and implementing regulations at 40 C.F.R. 122.26. The overriding objective of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). To help meet this objective, various goals were established, including the elimination of pollutant discharges into navigable waters by 1985. CWA § 101(a)(1), 33 U.S.C. § 1251(a)(1).

As a step towards meeting this goal, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), was enacted to eliminate pollutant discharges. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits any person from discharging any pollutant to a water of the United States from a point source unless it complies with specified provisions of the CWA, including Section 402 of the CWA, 33 U.S.C. § 1342.

Section 402 established the National Pollutant Discharge Elimination System Program ("NPDES") under which EPA or an authorized state may issue a permit for the discharge of any pollutant, if the permit meets all applicable requirements of the Act. 33 U.S.C. § 1342(a). NPDES permits may be issued to individual dischargers or as general permits that apply to

groups of similar dischargers. Env. Def. Ctr. v. EPA, 344 F.3d 832, 853 (9th Cir. 2003).[1]

Congress amended the CWA in 1987 (See Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987)) in recognition, *inter alia*, of "the environmental threat posed by storm water runoff." NRDC v. EPA, 966 F.2d 1292, 1296 (9th Cir. 1992) (internal citations omitted). Traditionally, the primary focus of the NPDES program had been the discharge of industrial process wastewater and municipal sewage. 55 Fed. Reg. 47,990 (November 16, 1990). The amendment added Section 402(p), 33 U.S.C. § 1342(p), to require permits for certain storm water discharges.

Section 402(p) established a phased approach to the regulation of storm water discharges under the NPDES program in order "to allow EPA and the states to focus their attention on the most serious problems first." NRDC v. EPA, 966 F.2d 1292, 1296 (9th Cir. 1992) (citing 133 Cong. Rec. 991 (1987)). Among the discharges Congress required EPA to regulate in this initial, most urgent phase of the program were "storm water

[1] A general permit can also be issued by an EPA-approved state NPDES Permit program, pursuant to Section 402(b) of the CWA, 33 U.S.C. § 1342(b). EPA approved the State of California's NPDES General Permit Program on September 22, 1989. *See* 54 Fed. Reg. 40,664 (October 3, 1989). The California State Water Resources Control Board ("SWRCB") adopted Water Quality Order No. 97-03-DWQ/ NPDES General Permit No. CAS000001 ("General Permit") on April 17, 1997, to "enable[] the State to begin reducing pollutants in industrial storm water in the most efficient manner possible." *See* C's Init. Ex. 27, p. II. San Pedro Forklift is located in California; therefore the permit violations cited in the Administrative Complaint were of the California General Permit.

discharges associated with industrial activity." 55 Fed. Reg. 47,990, 48,007 (November 16, 1990); *see also* 33 U.S.C. § 1342(p)(2)(B).

EPA promulgated regulations to implement CWA Section 402(p)(2), (3) and (4)(A) in 1990, commonly known as the "Phase 1" storm water regulations. 55 Fed. Reg. 47,990 (November 16, 1990). EPA identified eleven categories of facilities with storm water discharges associated with "industrial activity" that are required to obtain an NPDES permit. 40 C.F.R. § 122.26(a)(1)(ii) and (b)(14)(i)-(xi).[2]

Among the facilities identified by EPA as having discharges associated with industrial activity, are:

> Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14)(i)-(vii) or (ix)-(xi) of this section are associated with industrial activity.

40 C.F.R. § 122.26(b)(14)(viii).

Subsection (viii) sets forth a two-step process to establish that a particular facility is required to obtain a permit for its storm water discharges. First, the facility must

[2] EPA defined the 11 categories selected for regulation either solely by SIC code, solely through a narrative description, or through a hybrid approach. Subsection (viii), the paragraph at issue in the instant case, is defined by SIC code and a narrative description.

have one of the enumerated Standard Industrial Classification ("SIC") codes.[3] Secondly, the facility must have a vehicle maintenance shop, equipment cleaning operations, or airport deicing operations. It is this regulatory provision which is at issue in the instant case.

B. Factual Background

Appellee, San Pedro Forklift, operates a facility located at the Port of Los Angeles, where it has been a tenant since 1999. C's Init. Ex. 37.[4] Appellee's primary business is the transloading of goods from over-the-road trailers onto ocean containers and vice versa for export and import. C's Init. Ex. 33; Tr. 2169:10-2170:12. Transloading is the process of transferring shipments of goods from one mode of transportation to another. Tr. 1916:17-1917:6. Appellee uses forklifts, yard goats,[5] a truck and other equipment and machinery in their transloading operations. C's Init. Ex. 12, p.8. Appellee

[3] The Standard Industrial Classification ("SIC") was developed for use in the classification of establishments by type of activity in which they are engaged, in order to, among other things, promote uniformity and comparability in the presentation of statistical data. Office of Mgmt. & Budget, Exec. Office of the President, Standard Industrial Classification Manual (1987) at 11. SIC Codes were used "because they are commonly used and accepted and would provide definitions of facilities involved in industrial activities." 55 Fed. Reg. 47,990, 48010 (November 16, 1990).

[4] Exhibits are cited here in the same manner the Presiding Officer referred to them in the Initial Decision. *See* Init. Dec. at 5.

[5] "[A] yard goat is akin to a smaller big rig or truck commonly used in ports to move things from one site to another or for unloading cargo." Init. Dec. at 22 n.16.

classified themselves under SIC Code 4213, "Motor Freight Transportation and Warehousing." C's Rebut. Ex. 1.

EPA inspected Appellee's facility on May 17, 2007. The EPA inspector observed evidence of on-site vehicle maintenance and equipment cleaning activities. Specifically, the inspector observed a 55-gallon drum covered with an oily substance, smaller buckets containing oily material, and the area smelled like engine oil. Tr. 95:14-96:4; Tr. 107:1-108:20. There was staining on the wall behind the containers, as well as a large stain that started under the 55-gallon drum, Tr. 95:21-96:2, and staining throughout the facility yard. Tr. 123:2-8. The inspector also saw someone washing a forklift on the loading dock. Tr. 119:1-20. At that time, Appellee had not applied for coverage under the General Permit. EPA issued an Administrative Order ("AO") on November 9, 2007 that required Appellee to obtain coverage under the General Permit and develop and implement a Storm Water Pollution Prevention Plan ("SWPPP") and a monitoring program. C's Init. Ex. 28.

On August 18, 2009, EPA inspectors returned to Appellee's facility. Although Appellee had obtained permit coverage under the General Permit and developed a SWPPP, the inspectors observed violations of the permit.[6] EPA then issued a second AO

[6] The inspector identified a variety of poor housekeeping practices in violation of applicable permit requirements. The inspector saw trash and debris throughout the facility yard, obsolete equipment, tires and

on September 25, 2009 which required the Appellee to sample its storm water and revise and implement a SWPPP in accordance with the terms of the General Permit. C's Init. Ex. 29.

C. Procedural Background

EPA filed a Complaint against Appellee on September 29, 2009 pursuant to Section 309(g) of the CWA, 33 U.S.C. 1319(g), alleging violations of Sections 301(a) and 308(a) of CWA, 33 U.S.C. § 1311(a) and § 1318(a), as follows:

Count I: Discharging pollutants to waters of the United States without a permit.

Count II: Failing to submit an application for permit coverage 180 days prior to commencing industrial activity.

Count III: Failing to develop and implement a SWPPP and a monitoring program as required by the General Permit.

Appellee filed an Answer to the Complaint on November 5, 2009, in which it neither admitted nor denied the specific allegations in the Complaint, but denied that a permit was required. Appellee also requested a hearing.

On November 12, 2010, Appellant filed a Motion for Partial Accelerated Decision as to liability for Counts 1 and 2. By Order dated January 7, 2011, the Presiding Officer denied Appellant's Motion.

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agricultural commodities. *See* C's Init. Ex. 16 and 17. Filters had not been installed on the storm drains. *Id.*

The hearing in this matter was held in Los Angeles, California from January 24-29, 2011, at which the parties presented testimony and documentary evidence.[7] On January 27, 2012, the Presiding Officer issued an Initial Decision, in which she dismissed EPA's Complaint for lack of Jurisdiction.

## V. STANDARD OF REVIEW

The standard of review employed by the Environmental Appeals Board ("EAB" or the "Board") in reviewing the initial decision of a Presiding Officer is based on the Administrative Procedure Act which provides, in part: "On appeal from or review of the initial decision, the agency [in this case the Board] 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." 5 U.S.C. § 557(b). The Consolidated Rules specify that the Board, on appeal, "[S]hall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed . . ." 40 C.F.R. § 22.30(f).

The published decisions of the Board have confirmed the plenary nature of the Board's authority on appeal from an initial decision, noting that "[i]n an enforcement proceeding

[7] On May 26, 2011 and June 13, 2011 Appellee filed Motions to Augment the Record/Requests for Judicial Notice. Because the Presiding Officer dismissed the Complaint in her Initial Decision, both motions were denied as moot.

like the one at hand, the Board reviews a presiding officer's factual and legal conclusions *de novo*. 40 C.F.R. § 22.30(f) (conferring authority on the Board to 'adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed');...". In re City of Marshall, Minnesota, 10 E.A.D. 173, 180 (EAB, October 31, 2001).

## VI. ARGUMENT

### A. The Presiding Officer erred in dismissing the Complaint for lack of jurisdiction under 40 C.F.R. § 122.26(b)(14)(viii) based on an interpretation of "associated with industrial activity" that unreasonably narrows the scope of the regulations.

In order for Appellee's facility to be discharging storm water "associated with industrial activity" for purposes of 40 C.F.R. § 122.26(b)(14)(viii, it must be a transportation facility classified under SIC codes 40, 41, 42 (except 4221-25), 43, 44, 45 and 5171 and have a vehicle maintenance shop, equipment cleaning operations, or airport deicing operations. It is undisputed by the parties and the Presiding Officer that Appellee's transloading facility is a transportation facility that falls within an enumerated SIC code, 4213.[8] The only issue

[8] Appellee classified themselves under SIC Code 4213, one of the enumerated SIC Codes found in 40 C.F.R. §122.26(b)(14)(viii). In the preamble to the Final Rule EPA stated that "[i]ndustries will need to assess for themselves whether they are covered by a listed SIC and submit an application accordingly." 55 Fed. Reg. 47,990, 48,010 (November 16, 1990). As such, the Presiding Officer accepted, without deciding, that Appellee was properly classified as SIC 4213. Init. Dec. at 9 n.2. Thus, Appellant met the first

for this appeal is whether Appellee had a vehicle maintenance shop or engaged in equipment cleaning operations.

The Presiding Officer found that Appellant had established that vehicle maintenance and equipment cleaning took place at Appellee's facility.[9] Despite finding that both maintenance and equipment cleaning took place at the site, the Presiding Officer dismissed the Complaint, concluding that additional evidence was needed to prove the presence of a vehicle maintenance shop or equipment cleaning operations.

In assessing whether or not Appellee had a vehicle maintenance shop or engaged in equipment cleaning operations, the Presiding Officer emphasized that she believed Appellant had not given significance to the words "shop" or "operation." The Presiding Officer held that "vehicle maintenance shops" and "equipment cleaning operations" must be read in their entirety, focusing her analysis on the "settled rule that a statute must, if possible, be construed in such a fashion that every word has some operative effect." Init. Dec. at 20 (citing U.S. v. Nordic Village, Inc., 503 U.S. 30, 36 (1992)).

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step to establish that Appellee was a discharger associated with industrial activity.

[9] "Taken together, the credible evidence offered by [the EPA inspector], combined with the documentary evidence admitted at hearing, admissions by Respondent, and testimony by Mr. Renato Balov, support the conclusion that Respondent was conducting occasional activities that might properly be termed maintenance of vehicles and equipment." Init. Dec. at 29. "The credible testimony by [the EPA inspector] establishes that during the first EPA inspection, she observed a man rinsing a forklift with a garden hose while on the loading dock." Init. Dec. at 37.

Because neither phrase is defined in the regulations, the Presiding Officer consulted a dictionary which defined "shop" as "'a building or room stocked with merchandise for sale' or, in the context of repairs, 'a commercial establishment for the making or repairing of goods or machinery.'" *Id.* at 20.

The Presiding Officer concluded that a "vehicle maintenance shop" could be demonstrated either by "a discrete structure used *for the purpose* of vehicle maintenance" or by "sufficient evidence that [an entity] was engaged in an industrial establishment *for the purpose* of maintaining or repairing vehicles." *Id.* at 30 (emphasis added). Under this standard, "purpose" is ascertained by evaluating the level of vehicle maintenance activities taking place at a facility.[10] The Presiding Officer concluded that absent a "discrete structure" a vehicle maintenance shop could be shown "by the presence of a sufficient volume, level, and concentration of outdoor repair activity [...]." *Id.*

In construing the term "equipment cleaning operations," t e Presiding Officer also consulted a dictionary to define "operations." She relied on a definition of "operations" as "a business transaction [especially] when speculative . . . the

[10] At several points during the evidentiary analysis in the Initial Decision, the Presiding Officer references this concept of frequency "regular, ongoing maintenance activities" (p.24); "regularized maintenance" (p.24, n.17); "sufficient volume, level, and concentration of outdoor repair activity" (p.30); and "vehicle maintenance on a scale consistent with having a 'vehicle maintenance shop'" (p.29).

whole process of planning for and operating a business or other organized unit . . . a phase of a business or of business activity ...." Init. Dec. at 31. The Presiding Officer also found that "equipment washing activities must rise to the level of a business 'operation' before triggering the coverage of Paragraph (viii)." Init. Dec. at 32.

Applying these standards to the facts in the instant case, the Presiding Officer found, despite uncontroverted evidence documenting maintenance and cleaning at the facility, the evidence did not satisfactorily demonstrate the presence of a vehicle maintenance shop or equipment cleaning operations, and dismissed the Complaint.

1. The Presiding Officer erred in finding that, for purposes of 40 C.F.R. § 122.26(b)(14)(viii), absent "a discrete structure used for the purpose of vehicle maintenance," establishing the presence of a "vehicle maintenance shop" requires showing outdoor maintenance and repair activity of such a "volume, level and concentration" that the entity can be found to be "engaged in an industrial establishment for the purpose of maintaining or repairing vehicles."

The Presiding Officer's requirement for a level of activity equivalent to a maintenance establishment is not supported by the legislative history or the preamble to the Phase I rules. Appellant agrees that the presence of a "discrete structure used for the purpose of vehicle maintenance" would certainly be considered industrial activity within the definition of 40

C.F.R. § 122.26(b)(14)(viii). However, the regulatory history indicates a broader focus on where maintenance activities take place, so that storm water pollution controls would be targeted where the activities occurred. The regulatory history also shows that EPA is primarily concerned with identifying the underlying industrial activity which occurs at Subsection (viii) transportation facilities, and requiring the implementation of storm water pollution controls for maintenance, cleaning and deicing activities at such industrial facilities, rather than using volume to limit the applicability of such requirements.

The Presiding Officer's focus on volume, level and concentration of vehicle maintenance to evaluate industrial activity for transportation facilities is in error. Instead, the existence of on-site vehicle maintenance activities at Subsection (viii) transportation facilities with one of the listed SIC codes is enough to trigger permit coverage. Not only is the Presiding Officer's standard unsupported by the regulation, the regulatory history, the preamble and other comment responses in the record for the regulation, it creates serious implementation and policy problems.

a. <u>The Presiding Officer's standard is unsupported by the regulation, preamble, and record statements about the regulation.</u>

The Presiding Officer's requirement for "a sufficient volume, level, and concentration of outdoor repair activity" in

the absence of an enclosed structure as evidence of a vehicle maintenance "purpose" is in error, for several reasons. First, it introduces a subjective determination regarding a threshold level of activity that is not required by the regulation. Despite being industrial in nature, as reflected in an applicable SIC Code, under this threshold requirement facilities would not be subject to regulation because of a purported insufficient volume, level and concentration of outdoor repair activity. In other words, they are not industrial "enough."

Second, by using volume of maintenance activity as a means of determining the purpose of the facility, the Presiding Officer effectively requires that the vehicle maintenance function subsume the overall function of the facility, in this case, transloading of freight. For example, the Presiding Officer stated that in contrast to rail yards where trains are maintained and repaired, "the purpose of Respondent's Facility is not to maintain and repair forklifts that are transported to and concentrated at the Facility." Init. Dec. at 30. However, this comparison mistakenly contrasts the purpose of a portion of a railroad[11] -- the rail yard -- with Respondent's entire transloading facility. The purpose of a railroad is to provide vehicle and freight transportation, and vehicles and equipment used on the railroad are maintained in a portion of the railroad

[11] Railroads, classified under transportation SIC codes (Major Groups 40 and 41), are included in 40 C.F.R. § 122.26(b)(14)(viii).

(i.e. the rail yard). Similarly, the purpose of Respondent's facility is to move freight from one mode of transportation to another, and at portions of the facility, forklifts were maintained. There is no support for this interpretation in the regulation, preamble, or record statements.

Application of the Presiding Officer's standard results in an unreasonable narrowing of transportation facilities whose discharge is defined as storm water associated with industrial activity. Congress' directive to the EPA was to control storm water discharges associated with industrial activity; EPA's rule does not exempt those industries with a lower volume of activities relative to *other* industrial facilities. The only relevant volume comparison is the one used to distinguish industrial activities from service and commercial activities. This point is supported by the Preamble, which gives examples of such a permissible comparison:

> Transportation facilities such as bus depots, train yards, taxi stations, and airports are generally larger than individual repair shops, and generally engage in heavier more expansive forms of industrial activity. In keeping with Congressional intent to cover all industrial facilities, permit applications for such facilities are appropriate. In contrast, EPA views gas stations as retail commercial facilities not covered by this regulation. It should be noted that SIC classified gas stations as retail.

55 Fed. Reg. 47,990, 48,013-14 (November 16, 1990).

In responding to the Congressional directive to control storm water associated with industrial activity, EPA deferred addressing other types of activities which generate pollutants in storm water discharges. Commercial or service related activities were specifically excluded from the definition of storm water associated with industrial activity. 55 Fed. Reg. 47,990, 48,007 (November 16, 1990) ("legislative history supports the decision to exclude from the definition of industrial activity. . . those facilities that are generally classified under [OMB SIC codes] as wholesale, retail, service or commercial activities.").

Once this distinction is made, and discharges are defined as discharges associated with industrial activity, the Presiding Officer should not have created a "volume" bar that is not in the regulations as a means to second guess whether that inclusion was correct.

The Presiding Officer's volume requirement is also explicitly rebutted in NPDES Storm Water Program Question and Answer Documents. In answering a question about marinas, also considered transportation facilities, EPA explained that facilities "primarily engaged" in operating marinas are classified as SIC 4493 Marinas, and such facilities rent boat slips, store boats and "generally perform a range of other marine services including boat cleaning and *incidental* boat

repair." Office of Wastewater Enforcement and Compliance, U.S. EPA, NPDES Storm Water Program Question and Answer Document Volume 1 ("Q&A Volume 1"), (EPA-833-F-93-002) (March 16, 1992) at 37 (emphasis added).[12] EPA explained that permit applications are required from facilities classified as 4493 who are involved in vehicle (boat) maintenance, even if that is not their primary business. *Id.*

Thus, a facility whose purpose is not vehicle maintenance and repair, in other words, where there is only incidental vehicle maintenance and repair, is still subject to the storm water permitting regulations. Therefore, the Presiding Officer's requirement for "a sufficient volume, level, and concentration of outdoor repair activity" as evidence of a vehicle maintenance purpose is in error.

b. The Presiding Officer's standard causes serious implementation and policy problems.

Not only is the Presiding Officer's standard impermissibly unsupported, it creates serious implementation and policy problems. The Presiding Officer has articulated various narrative standards in the Initial Decision: "a sufficient volume, level and concentration of outdoor repair activity", the

[12] Q&A Volume 1 is found in Appendix D to the 1995 Report to Congress. Office of Water, U.S. EPA, Storm Water Discharges Potentially Addressed by Phase II of the National Pollutant Discharge Elimination System Storm Water Program Report to Congress ("1995 Report to Congress") (EPA-K-94-002) (March 1995). The Presiding Officer consulted EPA's 1995 Report to Congress when writing the Initial Decision. Init. Dec. at 3, n.1.

presence of "a vehicle fleet", "regular, ongoing maintenance", "regularized maintenance", "vehicle maintenance on a scale consistent with having a 'vehicle maintenance shop'". However, none of these standards has a stated means by which to evaluate them.[13] For example, what exactly constitutes a vehicle fleet? Are 3 forklifts enough? Are 30 forklifts needed? What is regularized maintenance? Is monthly maintenance considered regularized, or is weekly enough?

While these standards might provide a guide for the Agency's enforcement program in terms of what questions to include in an information request, or areas to examine when conducting inspections, they offer no means to evaluate whether the facility is subject to the regulations. This is a significant impediment to enforcement and compliance assistance efforts.

The multiplicity of interpretations to which the Presiding Officer's standards are susceptible to also creates uncertainty for the regulated community. The operator of one transportation facility may decide that their vehicle maintenance activities subject them to the storm water regulations, while another

[13] Despite several references to this concept of frequency of maintenance, at only one point does the Presiding Officer articulate what "frequent" actually means. ". . . daily maintenance activities that would customarily require the presence of a dedicated machine shop." Init. Dec. at 31, n.19. If daily is the frequency of maintenance which the Presiding Officer intended as the standard by which to evaluate the presence of a "vehicle maintenance shop", there is no support for this standard in the legislative history. This reference, however, is in a footnote, and its relevance is not entirely clear.

operator with the same volume of maintenance may come to the opposite conclusion. The equitable applicability of federal regulations demands consistency in their interpretation. Thus, the Presiding Officer's interpretation creates serious implementation and policy problems.

c. The Presiding Officer's interpretation is unreasonable.

It is unreasonable to require permit applications from wholly-contained maintenance structures, which shield the vast majority of pollutants from rain, but not from transportation facilities which conduct less frequent, outdoor maintenance exposed to direct rainfall, thus maximizing the likelihood of pollutant discharges. The Presiding Officer's standard results in roofed vehicle maintenance shops which only have exposure to storm water at points of access and egress, being required to control pollutants in storm water discharges, but leaves maintenance activities that are wholly outside and exposed to precipitation exempt from having to implement storm water controls if they don't rise to the level of a "maintenance establishment." "Where the literal reading of a statutory term would 'compel an odd result,' we must search for other evidence of congressional intent to lend the term its proper scope." Public Citizen v. Department of Justice, 491 U.S. 440, 454 (1989) (internal citations omitted). In light of the entire

regulation, the only interpretation of "vehicle maintenance shop" which makes sense is one related to the location of vehicle maintenance activities, i.e., on site, regardless of the presence of a discrete structure or volume of activity.

d. A "vehicle maintenance shop" is the location within a transportation facility where vehicle maintenance occurs.

EPA was concerned with the areas where industrial activities take place, whether those activities occur within a discrete structure or not. For example, in response to a commenter to the 1990 Final Rule who felt that covered maintenance facilities (i.e. roofed structures) should not be included in the definition of "storm water associated with industrial activity" found in 40 C.F.R. § 122.26(b)(14), EPA stated that these areas should be included because "[m]aintenance facilities will invariably have points of access and egress, and frequently will have outside areas where parts are stored or disposed of. Such *areas* are locations where oil, grease, solvents, and other materials associated with maintenance *activities* will accumulate." 55 Fed. Reg. 47,990, 48,009 (November 16, 1990) (emphasis added).

The term "vehicle maintenance shop" refers to the location where vehicle maintenance activities take place, and it is these activities in the context of industrial facilities which triggers the applicability of the Phase I Storm Water

regulations. Therefore, discrete structures where maintenance activities take place, as well as *any other locations* at a transportation facility where such activities take place, are subject to permitting.

The term "maintenance shop" in the first sentence of 40 C.F.R. § 122.26(b)(14)(viii) must be read in concert with the second sentence. "Statutory construction....is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." United Savings Ass'n v. Timbers of Inwood Forest, 484 U.S. 365, 371 (1988) (internal citations omitted). The second sentence clarifies that "maintenance shop" is meant to refer to a location or area where vehicle maintenance activity, and thus industrial activity, take place: "[O]nly those *portions of the facility* that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, [. . .] are associated with industrial activity." 40 C.F.R. § 122.26(b)(14)(viii) (emphasis added). The Agency's focus is on defining where industrial activity takes place.

This focus is reflected in the Preamble to the 1990 Final Rule, which clarified the definition of "associated with

industrial activity" to focus on the areas and sites where industrial activities occur at facilities:

> Today's rule clarifies the regulatory definition of "associated with industrial activity" by adopting the language used in the legislative history and supplementing it with a description of various types of areas that are directly related to an industrial process (*e.g.*, industrial plant yards, immediate access roads and rail lines, drainage ponds, material handling sites...sites used for the storage and maintenance of material handling equipment...).

55 Fed. Reg. 47,990, 48,007 (November 16, 1990).

The inclusion of the term material handling sites is an example of this focus on areas where industrial activities take place. The regulation at 40 C.F.R. § 122.26(b)(14) states, in reference to the term "storm water discharge associated with industrial activity," that "[f]or the categories of industries identified in this section, the term includes, but is not limited to, . . . material handling sites . . . sites used for the storage and maintenance of material handling equipment...."

The Preamble goes on to provide responses to comments which reflect this focus on the locations/areas of industrial activity. For example, EPA disagreed with comments that road and railroad drainage within a facility should not be included in the definition of "associated with industrial activity," stating that these are "areas that are likely to accumulate extraneous materials from raw materials. . . [and are] repositories for pollutants such as oil and grease from machinery or vehicles

using these areas. As such they are related to the industrial activity at facilities." Fed. Reg. 47,990, 48,009 (November 16, 1990).

EPA also disagreed with a commenter who wanted the regulations to emphasize, with respect to covered storage areas, "that only facilities that are not totally enclosed are required to submit permit applications." EPA noted that "the legislative history refers to storage areas, without reference to whether they are covered or uncovered or of a certain size." 55 Fed. Reg. 47,990, 48,010 (November 16, 1990). Thus, the area where items related to industrial activity are stored is the priority.

As the above citations reflect, the Phase I regulations are concerned with vehicle maintenance that takes place on-site at 40 C.F.R. § 122.26(b)(14) facilities. EPA's Q&A Volume 1 explicitly addresses this issue in responding to a question about manufacturing facilities offsite vehicle maintenance:

> An offsite vehicle maintenance facility supporting one company would not be required to apply for a permit if that company is not primarily engaged in providing transportation services and therefore would not be classified as SIC code 42. The maintenance facility would be considered an auxiliary operation to the manufacturing facility.... If the maintenance facility is located <u>on the same site</u> as the manufacturing operation, it would be included in the areas associated with industrial activity and must be addressed in an application.

Office of Wastewater Enforcement and Compliance, U.S. EPA, Q&A Volume 1, (EPA-833-F-93-002) (March 16, 1992)at #36 (emphasis in original).

When responding to comments cited earlier about the need to include roofed maintenance facilities, the Agency clarified that "such areas are only regulated in the context of those facilities enumerated in the definition at 122.26(b)(14), and not similar areas of retail or commercial facilities." 55 Fed. Reg. 47,990, 48,009 (November 16, 1990). Thus, it is the on-site vehicle maintenance at *industrial* facilities which is defined as storm water associated with industrial activity in the Phase 1 storm water regulations.

The term "vehicle maintenance shop" refers to the location where vehicle maintenance activities take place, and it is these activities in the context of industrial facilities which describe the locations generating contaminated storm water associated with industrial activity. "Shop" is also defined as "[a] place for manufacturing or repairing".[14] A "place" does not require a building or a structure; it is simply a location where vehicle maintenance occurs.

[14] The American Heritage Dictionary, 1132 (1976). If the court views the issue as one of deference to an administrative interpretation, then the agency's choice of one alternative dictionary definition over another may indicate sufficient "reasonableness." Smiley v. Citibank (South Dakota), 517 U.S. 735, 744-47 (1996).

e. On-Site vehicle maintenance at transportation facilities satisfies the jurisdictional requirements of 40 C.F.R. § 122.26(b)(14)(viii).

Once a facility falls into one of the enumerated SIC codes, the existence of vehicle maintenance, equipment cleaning or airport deicing activity triggers the requirement for a permit. EPA made this clear when it declined to exclude from regulation "railroad tracks where rail cars are set aside for minor repairs," stating "if the activity involves *any* [vehicle maintenance] activities then a permit application is required." 55 Fed. Reg. 47,990, 48,013 (emphasis added) (November 16, 1990). Further, as described earlier, EPA explained that facilities classified as SIC 4493 are "primarily engaged" in operating marinas and are subject to the regulations even if they only engage in incidental boat repair. The Agency is concerned about the presence of even "incidental" maintenance at facilities classified under one of the enumerated SIC codes.

In a 1995 Report to Congress, EPA evaluated sources of storm water pollution that were already subject to permitting requirements under the Phase 1 storm water regulations in order to determine if there were additional sources that should also be regulated under the next phase of the program. When discussing activities that occur at airports (which are also Subsection (viii) transportation facilities), EPA further clarified what activities were already addressed at such

facilities: "[m]aintenance activities included in this section include both *minor* and major operations conducted either on the apron adjacent to the passenger terminal, or at dedicated maintenance facilities." Office of Water, U.S. EPA, Storm Water Discharges Potentially Addressed by Phase II of the National Pollutant Discharge Elimination System Storm Water Program Report to Congress ("1995 Report to Congress") (EPA-K-94-002) (March 1995) at E-43 (emphasis added). This illustrates that EPA intended even minor maintenance activity at facilities with enumerated SIC codes would trigger the need for a permit application.

EPA's Q&A Volume 1 reaffirms this position. Question #35 states that the non-retail fueling operation of a transportation facility (SIC 40-45) requires a permit application even if there are no other vehicle maintenance operations taking place. Office of Wastewater Enforcement and Compliance, U.S. EPA, Q&A Volume 1, (EPA-833-F-93-002) (March 16, 1992) at #35. Thus, a singular maintenance activity is sufficient to trigger permit coverage.

Therefore, what the Presiding Officer identifies as occasional maintenance still constitutes acts which are associated with industrial activity.[15] The question is not at what frequency such maintenance takes place, but does it take place at a location within the facility.

[15] *See* Init. Dec. at 29.

In one respect, the Presiding Officer is correct: San Pedro Forklift is not "an industrial establishment for the purpose of maintaining or repairing vehicles." Init. Dec. at 30. However, Appellant does not have to prove that Appellee is a maintenance and repair facility that also conducts transportation activities. Appellant must only prove that Appellee is a transportation facility that also conducts on-site vehicle maintenance and repair.

Therefore, the Presiding Officer erred when she required a sufficient volume, level, and concentration of outdoor repair activity, for applicability of the Phase I storm water regulations.

2. The Presiding Officer erred in finding that to establish the presence of "equipment cleaning operations" for purposes of 40 C.F.R. § 122.26(b)(14)(viii), EPA must show a systematic equipment cleaning process or operation that has a distinct commercial or organizational purpose.

The Presiding Officer's requirement for systematic cleaning with a specified purpose is not supported by the regulation, the preamble, record statements, or the legislative history. Equipment cleaning itself is the focus of the Agency's concern, not its systematic or organizational aspects. Transportation facilities which engage in equipment cleaning, regardless of volume, are subject to the storm water regulations.

a. The regulation does not require a facility to have systematic cleaning operations.

The Presiding Officer found that Appellant observed Appellee rinse a forklift (Init. Dec. at 37) and that Appellee stated that it eliminated vehicle washing in response to the EPA's 2007 AO (*Id.* at 36, n.24). However, the Presiding Officer went on to conclude that Appellee did not engage in "a systematic process or 'operation' that has a distinct commercial or organizational, though not necessarily profit-relevant, purpose for the regulated entity." *Id.* at 37.

Specifically, the Presiding Officer presumes a specified frequency of activity is required to satisfy the jurisdictional requirements of Subsection (viii). "An 'operation' is more than periodically wiping dirt off the surface of a trailer and it is more than occasionally hosing off the exterior of a forklift." Init. Dec. at 37. This conclusion is based on a misapprehension of the term "equipment cleaning operations" as it is used in the regulation.

EPA included "equipment cleaning operations" in the definition of storm water associated with industrial activity because of concerns that the spent wash water would be contaminated by surface dirt, metals, and fluids (including fuel, oil, and hydraulic fluid). Office of Water, U.S. EPA, 1995 Report to Congress (EPA-K-94-002) (March 1995) at E-43. The wash

water, if not properly controlled, would evaporate and leave pollutants behind which would then discharge during the next precipitation event.

In the 1995 Report to Congress, EPA described "equipment cleaning operations" at transportation facilities that triggered regulation under the Phase I Program. EPA focused on the "*areas* where the following types of activities take place: vehicle exterior wash down, interior trailer washouts, tank washouts, and *rinsing of transfer equipment*." Office of Water, U.S. EPA, 1995 Report to Congress (EPA-K-94-002) (March 1995) at E-38 (emphasis added). EPA was concerned about where such activities took place in order to assure that controls were implemented and did not focus on whether the activities had a "distinct commercial or organizational purpose."

The Presiding Officer also likened individual forklift washing to individual car washing and found that since such car washing was not defined as "storm water" under the regulations, the individual forklift washing observed by Appellant could not trigger 40 C.F.R. § 122.26 (b)(14)(viii). Init. Dec. at 38. However, EPA's choice not to include discharges from individual car washing in the definition of storm water associated with industrial activity does not mean EPA meant to establish a quantum of washing activities that would have to be present before a facility has an "equipment cleaning operation."

EPA promulgated a definition of "storm water" in the Phase 1 regulations as "storm water runoff, snow melt runoff, and surface runoff and drainage," and declined to include commonly occurring non-storm water discharges, such as individual car washing. 55 Fed. Reg. 47,990, 47,995 (November 16, 1990); *see also* 40 C.F.R. § 122.26(b)(13). EPA said that the Phase 1 storm water regulations were not the proper forum to address these non-storm water discharges. *Id.* By excluding these discharges from Phase I, EPA was not saying such discharges do not require an NDPES permit.[16] *Id.* Instead, Congress intended the term "storm water" to apply ONLY to discharges composed entirely of storm water, not to discharges resulting from non-precipitation events, even if those discharges contain only *de minimus* amounts of pollutants. *Id.* EPA specifically recognized that NPDES permits would be required for these discharges. *Id.* However, as noted above, this is different from how EPA defined "storm water associated with industrial activity."

EPA recognized that all of the facilities described in 40 C.F.R. § 122.26(b)(14)(viii) would not engage in the same volume

[16] While EPA has authorized some non-storm water discharges as "allowable" in general permits issued to cover storm water discharges associated with industrial activity [e.g., fire hydrant flushing, irrigation water, etc.], EPA specifically noted that "vehicle and equipment washwaters are not authorized discharges and must be separately permitted." 60 Fed. Reg. 50,804, 50,982 (September 29, 1995). In the permit at issue in this case, California specifically stated that rinse water and wash water are unauthorized storm water discharges that must be eliminated or covered by a separate NPDES permit. General Permit, Section A.6.a.v; *see also* General Permit Fact Sheet at IX.

of industrial activity. EPA noted that transportation facilities "*generally* engage in heavier more expansive forms of industrial activity" than gas stations. 55 Fed. Reg. 47,990, 48,013 (November 16, 1990) (emphasis added). However, EPA's use of the word "generally" indicates that the Agency believed that this would not always be the case. Despite this potential for variation, the Agency made the determination to include transportation facilities that engage in equipment cleaning in the definition of storm water discharges associated with industrial activity. Therefore, transportation facilities which engage in equipment cleaning, regardless of volume, are subject to the definition.

b. The Presiding Officer's standard creates serious implementation and policy problems.

The Presiding Officer's belief that the regulations only contemplate regulation of "sustained or organized operations" is contrary to the intent of the regulations. Taken to its logical conclusion, this standard requires a facility that engages in organized equipment washing to apply for permit coverage, but allows a facility that washes or rinses equipment in a sporadic or disorganized manner to avoid regulation.

In addition, similar to the issues cited previously in section V.A.1.b regarding the practical enforcement issues with narrative standards, there is no stated way to evaluate a

"systematic process or "operation." The facts in the instant case illustrate this problem. EPA inspectors observed Appellee engaged in equipment cleaning at the facility. Tr. 119:1-20. The Presiding Officer found Appellee's efforts to dispute this observation "unpersuasive." Init. Dec. at 36-37. Moreover, in response to EPA's AO, Appellee stated that it "eliminated vehicle washing." Init. Dec. at 36, n.24. The only reasonable conclusion to be drawn from these facts is that Appellee engaged in equipment cleaning operations until such activities were halted following issuance of EPA's AO. It would be difficult for EPA to do more to prove the extent of such activity at industrial facilities and even so, there would then be no standard for what constitutes sufficient activity to trigger the standard. Thus, the Presiding Officer's interpretation creates serious implementation and policy problems.

3. The Presiding Officer unreasonably narrowed the scope of 40 C.F.R. § 122.26(b)(14)(viii).

The Presiding Officer's dismissal of the Complaint is based on a misapprehension of the terms "vehicle maintenance shop" and "equipment cleaning operation" as they are used in the regulation. In the name of giving every word in a statute operative effect, the Presiding Officer violated the very purpose of the canons of statutory construction, which is to

preserve regulatory intent. *See* Rice v. Rehner, 463 U.S. 713, 732 (1983). A canon of statutory construction is

> subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context, and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

SEC v. Joiner, 320 U.S. 344, 350-351 (1943).

By narrowly focusing on these two terms, the Presiding Officer ignored the larger storm water regulatory scheme and its objectives. Had this overall purpose been examined, it would have revealed EPA's intent to address all industrial dischargers through the Phase I regulations, not the narrower group of dischargers which application of her standard would result in.

In the 1987 Clean Water Act Amendments, Congress directed EPA to control discharges of storm water associated with industrial activity. 55 Fed. Reg. 47,990, 48,007 (November 16, 1990). In response, EPA promulgated the definition of "storm water associated with industrial activity" to encompass industrial activity "directly related to manufacturing, processing or raw materials storage areas at an industrial plant." *Id.* (citing Vol. 132 Cong. Rec. H10932, H10936 (daily ed. October 15, 1986); Vol. 133 Cong. Rec. H176 (daily ed. January 8, 1987)). The only "exceptions" at an industrial facility were

discharges from non-industrial plant areas, such as parking lots and administrative buildings.[17]

In selecting the categories of facilities considered to be "engaging in industrial activity," EPA chose "to focus in on those facilities which are most commonly considered 'industrial' and thought to have the potential for the highest levels of pollutants in their storm water discharges." 55 Fed. Reg. 47,990, 47,999 (November 16, 1990). EPA rejected comments which suggested that only SIC Codes associated with manufacturing should be regulated. "EPA disagrees that all the industrial activities that need to be addressed fall within [manufacturing] SICs. Discharges from facilities under paragraphs (i) through (xi) such as POTWs, *transportation facilities*, and hazardous waste facilities, are of an industrial nature and clearly were intended to be addressed [by the Phase 1 storm water program.]" 55 Fed. Reg. 47,990, 48,011 (November 16, 1990) (emphasis added). Thus, the definition of storm water discharge associated with industrial activity is not restrictive, but expansive.

Congress' directive was not to address only some industrial activity, or specific subgroups of industrial activity. Rather, if there is industrial activity, the storm water which results [illegible] shall be regulated. Therefore, the intent behind the

[17] The 9th Circuit has held that the term "discharges associated with industrial activity" is very broad and that Congress only intended to exclude discharges from non-industrial plant areas such as parking lots. NRDC v. EPA, 966 F.2d 1292, 1304 (9th Cir. 1992).

Phase 1 storm water regulations was to cast a broad net in defining industrial activities, and to defer action on other discharges.[18]

The Presiding Officer's interpretation contravenes this broad Congressional directive. This interpretation results in only the following types of transportation facilities being permitted under the storm water program: facilities with brick and mortar vehicle maintenance shops, facilities with outdoor repair activities whose maintenance and repair activities rise to a "sufficient" level, or facilities whose systematic equipment washing has a distinct commercial or organizational purpose.

The practical impact of the Presiding Officer's interpretation is also very important. This interpretation leaves out transportation facilities like San Pedro Forklift: a facility, which by its own admission, uses 110 gallons of engine oil, 60 liters of hydraulic fluid, 40 liters of transmission fluid, and 40 liters of coolant for forklift maintenance on an annual basis (Tr. 2160: 6-2161:5; C's Init. Ex. 12, p.8); a facility with buckets and drums of oily material stored outside, uncovered and exposed to rainfall (Tr. 99:116-100:4; see also C's Init. Ex. 14, p.3). Under the Presiding Officer's

[18] "Storm water discharges associated with industrial activity were considered "priority storm water discharges" and were included in the first, or Phase I, permits. 55 Fed. Reg. 47,990, 47994 (November 16, 1990).

interpretation of the regulations, this type of facility is not industrial enough.

The Presiding Officer has unreasonably narrowed the class of industrial dischargers subject to the definition of storm water associated with industrial activity. In so doing, the Presiding Officer misconstrued the regulations and introduced new and unreasonable narrative standards which are not indicated by the regulation's text, preamble, or other record documents. Further, this created standard is much more difficult to implement and enforce.

## VII. CONCLUSION

Pursuant to 40 C.F.R. § 22.31(a), Appellant respectfully proposes that the EAB issue a Final Order in this proceeding that REVERSES the Initial Decision of the Presiding Officer dated January 27, 2012. Accordingly, Appellant requests that the case be REMANDED to the Presiding Officer to conduct a determination of liability for all Counts alleged in the Complaint, and any consequent penalty assessment as well. In accordance with 40 C.F.R. § 22.30(a), Appellant submits the following:

### A. Alternative Conclusions of Law

Appellant proposes that the Board make the following conclusions of law, which are contrary to or in addition to the conclusions of law made by the Presiding Officer in the Order,

but which are consistent with the language and intent of 40 C.F.R. § 122.26(b)(16)(viii):

1. That under 40 C.F.R. § 122.26(b)(14)(viii), Transportation Facilities, as defined by the enumerated SIC Codes, which engage in the rehabilitation, mechanical repairing, fueling, or lubrication of vehicles, are associated with industrial activity and subject to the permitting requirements of Section 402(p)(2) of the CWA.

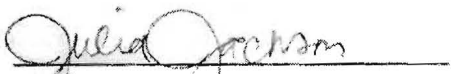
2. That under 40 C.F.R. § 122.26(b)(14)(viii), Transportation Facilities, as defined by the enumerated SIC Codes, which engage in equipment cleaning, are associated with industrial activity and subject to the permitting requirements of Section 402(p)(2) of the CWA.

## VIII. ORAL ARGUMENT

Appellant believes that the matters under appeal are more appropriately determined on briefing and does not request an oral argument. If the Board determines that an oral argument would be helpful in deciding the issues raised in this appeal, then Appellant respectfully requests that, pursuant to 40 C.F.R. § 22.30(c), an appropriate time and place be set for oral argument, with at least 30 days notice to the parties.

Dated: April 27, 2012

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of April, 2012:

A copy of the Notice of Appeal and Appeal Brief was sent to Appellee, by certified mail, return receipt requested, addressed as follows:

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A copy of the Notice of Appeal and Appeal Brief was also sent by first class mail addressed as follows:

Honorable Barbara A. Gunning
Administrative Law Judge (1900L)
Office of the Administrative Law Judges
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Dated: April 27, 2012 By: Beatrice N. Blacke
Office of Regional Counsel
USEPA, Region IX