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ENVIR. APPEALS BOARD  
**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 Gunning, Dated January 27, 2012**

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**RESPONDENT'S REPLY TO APPELLANT'S**  
**SUPPLEMENTAL BRIEF**

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## I.

### RESPONDENTS REPLY

On August 17, 2012 the Environmental Appeals Board issued an Order Directing Supplemental Briefing to the Environmental Protection Agency Region IX the (Appellant) requesting the legislative history and background supporting various regulations and the positions taken by Appellant in this matter.

On September 28, 2012 Appellant filed it's Supplemental Brief, which in large part is not directly responsive to the Board's request. This is particularly the case with regard to the following request by the Board:

**“Specify whether, as a matter of law, forklifts, yard goats, trucks, shipping or storage containers, and roll-off bins (of the type used at San Pedro’s facility) are “vehicles” and/or “equipment” under 40 C.F.R. Section 122.26(b)(14)(viii)”**

Instead of providing the requested materials, Appellant refers the Board to *Black's Law Dictionary* for the definition of “vehicle” and to the completely unsupported arguments in it's Opening Brief.

With regard to the inquiry pertaining to whether the simple rinsing of equipment constitutes “cleaning” as a matter of law, Appellant’s response is deceptive at best. The inquiry is as follows:

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

Appellant’s response is to cite to a 1995 EPA *Report* to Congress and to a *guidance manual* containing *recommendations*, neither of which have the force of law and are merely advisory. Appellant has therefore failed to establish that merely rinsing off equipment with a water hose, without more constitutes “cleaning” as a matter of law.

The same is also true pertaining to the inquiry regarding a “one-time repair” along a rail line. The evidence is undisputed that an approximately 500 ft long active rail line spur runs through San Pedro’s property adjacent to the loading dock and that trans-loading operations regularly take place involving cargo being loaded onto rail cars from trucks and vice versa.

For Appellant to simply state that “Question #32 is not applicable to

the facts of this case” is disingenuous and refuses to acknowledge the fact that rail trans-loading constitutes a material part of San Pedro’s activities, and thus any repairs made on Respondent’s premises would constitute a “transient repair” excepting such repairs from regulation.

**II**

**CONCLUSION**

For all of the foregoing reasons together with those set forth in Respondent’s Brief, the decision of the Administrative Law Judge dismissing the Complaint against Respondent should be affirmed.

DATED: October 12, 2012

Respectfully submitted,

FRANCESCHI LAW CORPORATION

BY: \_\_\_\_\_

  
Ernest I. Franceschi, Jr.  
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SAN PEDRO FORKLIFT, INC.

**CERTIFICATE OF SERVICE**

I certify that the original and five copies of the foregoing **RESPONDENT, SAN PEDRO FORKLIFT, INC.'S REPLY TO APPELLANT'S SUPPLEMENTAL BRIEF** via FedEx to:

U.S. Environmental Protection Agency  
Clerk of the Board, Environmental Appeals Board  
1341 G Street, N.W., Suite 600  
Washington, D.C. 20005

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

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Hon. Barbara J. Gunning  
Administrative Law Judge  
Office of Administrative Law Judges  
401 M Street, S.W.  
Washington, D.C. 20460

Dated: October 12, 2012

By  Ernest J. Franceschi, Jr.