

**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)**

**APPELLANT'S SUPPLEMENTAL BRIEF**

On August 17, 2012 the Environmental Appeals Board ("the Board") issued an "Order Directing Supplemental Briefing" ("Order"). The Order directed the Appellant, the Director of the Water Division, United States Environmental Protection Agency Region 9 ("EPA") to answer specific questions of interest to the Board. Appellant consulted with both the Office of General Counsel and the Office of Water in the preparation of this Supplemental Brief, and both offices concur on its contents. The following is the Appellant's response to the questions posed, submitted by and through counsel, in accordance with 40 C.F.R. § 22.30(a):

**(1) (a) - Identify and provide copies of any legislative history explaining Congress' intended meaning of the statutory term "discharge associated with industrial activity" in Clean Water Act § 402(p)(3)(A), 33 U.S.C. § 1342(p)(3)(A).**

We have found no explanation in any of the Congressional committee reports<sup>1</sup> for the term "discharge associated with industrial activity" in section 402(p)(3)(A) of the Clean Water Act. However, in debates on the Conference report for S. 1128,

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<sup>1</sup>Report of the Senate Environment and Public Works Committee, S. Rep. No. 99-50 (1985); Report of the House Public Works and Transportation Committee, H.R. Rep. No. 99-189 (1985); Report of the Senate-House Conference Committee on S. 1128, H.R. Rep. No. 99-1004 (1986). Both the Senate and House of Representatives passed the Conference substitute bill, S. 1128, in October 1986, but it was vetoed. The identical bill was introduced in January 1987 as H.R. 1, was passed by both houses of Congress, and again vetoed. Congress overrode the veto, and on February 4, 1987, the bill was enacted into law as Pub. L. No. 100-4. The only Congressional reports relating to the legislation are the three reports listed here.

(passed by Congress in 1986), as well as in debates on H.R. 1, to override the veto of S. 1128, there are several references in the Congressional Record to the meaning of the term "discharge associated with industrial activity." Each reference emphasizes what the term is not; namely discharges from administrative areas and parking lots.

A. Debates on S. 1128 (Conference bill)

[1] "It is important, however, to clarify that a discharge is 'associated with industrial activity' if it is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. Discharge [sic] which do not meet this definition include those discharges associated with parking lots and administrative and employee buildings." 132 Cong. Rec. H10932 (daily ed. October 15, 1986) (statement of G. Snyder).

[2] "Other storm water discharges are exempted from permits unless they fall into one of five categories. One of the discharge categories is 'a discharge associated with industrial activity.' A discharge is not considered to be associated with industrial activity unless it is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. Such discharges include those from parking

lots and administrative and employee buildings." 132 Cong. Rec. H10936 (daily ed. October 15, 1986) (statement of J. Rowland).

B. Debates on H.R. 1

[1] "It is important, however, to clarify that a discharge is 'associated with industrial activity' if it is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. Discharges which do not meet this definition include those discharges associated with parking lots and administrative and employee buildings." 133 Cong. Rec. H170 (daily ed. Jan. 8, 1987) (statement of J. Hammerschmidt).

[2] "A discharge is 'associated with industrial activity' if it is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. Discharges which do not meet this definition include those discharges associated with parking lots and administrative and employee buildings." Vol. 133 Cong. Rec. H176 (daily ed. January 8, 1987) (statement of A. Stangeland).

**(1) (b) - Identify and provide copies of any legislative history explaining whether Congress intended to require a certain number of incidences for a certain action to qualify as "industrial activity" (such as a certain quantity or frequency of "maintenance" in a "vehicle maintenance shop" or a certain quantity or frequency of "cleaning" in "equipment cleaning operations").**

We have not identified anything in the legislative history on this point.

**(2) (a) (i) - Identify and provide copies of any regulatory history (e.g., final rules, their preambles, and related guidance documents), including date, explaining EPA's intended meaning of the regulatory terms "storm water associated with industrial activity," "vehicle maintenance shop," and "equipment cleaning operations," as used in 40 C.F.R. §§ 122.26(b)(14) and 122.26(b)(14)(viii).**

Being mindful of the Board's guidance not to repeat arguments already submitted, Appellant is only identifying two additional regulatory history citations related to the intended meanings of the aforementioned terms.

[1] "Storm water discharges from all areas that are 'associated with industrial activity,' described at 40 C.F.R. § 122.26(b)(14), are subject to the storm water permit application requirements. This would include discharges from roofs of buildings that are within areas associated with industrial activity. In addition, storage areas of materials used in vehicle maintenance or equipment cleaning operations or holding yards or parking lots used to store vehicles awaiting maintenance are also considered areas associated with industrial activity." Office of Wastewater Enforcement and Compliance, U.S. EPA, NPDES Storm Water Program Question and Answer Document

Volume 2, EPA 833-F-93-002B, July 1993, ("Q&A Volume 2")

Question 23, p.9.

[2] "The term 'storm water discharge associated with industrial activity' means a storm water discharge from one of the eleven categories of industrial activity defined at 40 Code of Federal Regulations (CFR) 122.26(b)(14)(i) through (xi). Five of these categories are indentified by Standard Industrial Classification (SIC) code and the other six categories provide narrative descriptions of the industrial activity." Q&A Volume 2, Question 2, p.1.

**(2) (a) (ii) - Identify and provide copies of any regulatory history explaining whether EPA intended to require a certain number of incidences for a certain action to qualify as "industrial activity," "vehicle maintenance" in a "shop," or "equipment cleaning operations."**

We have not identified anything in the regulatory history indicating that EPA intended a certain number of maintenance or cleaning incidents would be required to qualify as industrial activity, vehicle maintenance in a shop, or equipment cleaning operations under 40 C.F.R. § 122.26(b)(14)(viii).

**(2) (b) - Identify and provide copies of any regulatory history, including date, explaining EPA's intended definition of the following discrete legal terms, which are used in 40 C.F.R. § 122.26(b)(14)(viii): (a) "vehicle," in the term "vehicle maintenance shop"; (b) "equipment," in the term "equipment**

**cleaning operations"; and (c) "cleaning," in the term "equipment cleaning operations."**

[1] In the preamble to the final rule, EPA clarified the term "vehicle maintenance," stating that it refers to the "rehabilitation, mechanical repairing, painting, fueling, and lubricating of *instrumentalities of transportation* located at the described facilities." 55 Fed. Reg. 47,990, 48,013 (November 16, 1990) (emphasis added).

[2] In 1999, EPA amended the regulations for industrial storm water discharges by providing a conditional exclusion from NPDES permit requirements which allow a facility covered by the storm water rule to certify that all industrial materials and activities are held or take place in a "storm resistant shelter" to prevent exposure to precipitation ("no exposure"). Such facilities would not be required to have industrial storm water permit coverage. In explaining the definition of "no exposure," EPA described "vehicles" as including "trucks, automobiles, forklifts, or other such general purpose vehicles at the industrial site that are not industrial machinery [. . .]. Similarly, trucks or other vehicles awaiting maintenance at vehicle maintenance facilities, as defined at § 122.26(b)(14)(viii), that are not leaking contaminants or are not otherwise a source of industrial pollutants, are not

considered exposed."<sup>2</sup> 64 Fed. Reg. 68,722, 68,785 (December 8, 1999).

[3] In describing equipment cleaning areas at transportation facilities that must be included in a permit application, EPA stated that "truck washing areas are identified as an example of an equipment cleaning area." Thus, the Agency considers trucks to be equipment, as well as vehicles. Office of Wastewater Enforcement and Compliance, U.S. EPA, NPDES Storm Water Program Question and Answer Document Volume 1, EPA-833-F-93-002, March 1992 ("Q&A Volume 1"), Question 22, p.9

[4] EPA created fact sheets to provide a brief summary of the NPDES industrial storm water permitting program, the types of facilities included in each sector, a summary of typical pollutants associated with each sector, and types of storm water control measures used to minimize the discharge of those pollutants. In the fact sheet for facilities falling under 40 C.F.R. § 122.26(b)(14)(viii), EPA described vehicle and equipment maintenance and equipment cleaning: "[ve]hicle and equipment maintenance is a broad term . . ." and further states,

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<sup>2</sup> As discussed in 2(a)(i) above, the storage of vehicles awaiting maintenance at a transportation facility is considered "industrial activity" for purposes of the rule: "[S]torage areas of materials used in vehicle maintenance or equipment cleaning operations or holding yards or parking lots used to store vehicles awaiting maintenance are also considered areas associated with industrial activity." Q&A Vol. 2, p.9 (emphasis added). The preamble discussion cited above describes how the "no exposure" conditional exclusion could apply to such areas.



"[e]quipment cleaning operations include areas where the following types of activities take place: Vehicle exterior wash down, Interior trailer washouts, Tank washouts, [and] Rinsing of transfer equipment." Industrial Storm Water Fact Sheet Series, Sector P: Motor Freight Transportation Facilities, EPA Office of Water, EPA-833-F-06-031, December 2006, ("Sector P Fact Sheet") pps.1-3.

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

Being mindful of the Board's direction to not repeat arguments, but respond as completely as possible, Appellant quickly reiterates a discussion made in its Post-Hearing Brief. Black's Law Dictionary (9th ed. 2009) defines "vehicle" as "[a]n instrument of transportation or conveyance" or "any conveyance used in transporting passengers or things by land, water, or air," while Webster's Ninth New Collegiate Dictionary (1990) defines it as "a means of carrying or transporting something." In this case, Respondent used forklifts to "move goods on to the trucks" and those goods were then trucked or shipped to their destination. Yard goats are both vehicles and equipment.<sup>3</sup> In the

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<sup>3</sup> For purposes of description only, we are including references to other sources which are useful for understanding what a "yard goat" is and how it works. The website [wiki.answers.com](http://wiki.answers.com) defines "yard goat" as follows: "It is a specialized piece of equipment for moving semi trailers. It has room for one

proceedings below, yard goats were described as small trucks, used to move and unload cargo. Init. Dec. at 22 n.16. Therefore, trucks, yard goats and forklifts are all "vehicles" under 40 C.F.R. § 122.26(b)(14)(viii), as the purpose of each is to transport goods from one place to another. Additionally, during promulgation of the Phase II storm water rule, EPA identified "trucks and forklifts" as "vehicles" in the context of the industrial storm water regulations. 64 Fed. Reg. 68,722, 68,785 (Dec. 8, 1999).

Finally, in the Sector P Fact Sheet, EPA lists "trailers" and "transfer equipment" in the context of equipment washing operations. Yard goats are transfer equipment, and shipping and storage containers and roll-off bins<sup>4</sup> are similar to trailers in both use and function, and as such, are also equipment. Sector P Fact Sheet at 2.

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operator, and a hydraulic fifth wheel so cranking up the legs of the trailer is unnecessary."

[http://wiki.answers.com/Q/Does\\_a\\_yard\\_goat\\_meet\\_the\\_definition\\_of\\_mobile\\_equipment#](http://wiki.answers.com/Q/Does_a_yard_goat_meet_the_definition_of_mobile_equipment#)

For a visual representation, see, [http://www.youtube.com/watch?v=P9B\\_s87fxFg](http://www.youtube.com/watch?v=P9B_s87fxFg)

<sup>4</sup> Similarly, for purposes of description only, the following is useful for understanding the term "roll-off bin." "A roll-off is an open top dumpster characterized by a rectangular footprint, utilizing wheels to facilitate rolling the dumpster in place. The open top container is designed to be transported by special roll-off trucks. Roll-offs are commonly used to contain loads of construction and demolition waste or other waste types. . . . Roll-off containers have a rectangular footprint typically determined by the size of typical trucks. . . . Roll-offs are placed by a roll-off trucks. As the roll-off truck raises its hydraulically operated bed, the roll-off container rolls off of the bed."

[http://en.wikipedia.org/wiki/Roll-off\\_\(dumpster\)](http://en.wikipedia.org/wiki/Roll-off_(dumpster))

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

In addition to EPA's 1995 Report to Congress discussed in Appellant's Brief In Support of Notice of Appeal, p. 30-31, EPA also specifically stated that rinsing constitutes equipment cleaning in guidance manuals and fact sheets for permits issued under the Phase I storm water regulations. Therefore, the rinsing or spraying of equipment qualifies as cleaning as a matter of law.

[1] EPA published a guidance manual in September 1992 to provide assistance to industrial facilities subject to storm water permit requirements. Storm Water Management for Industrial Activities: Developing Pollution Prevention Plans and Best Management Practices, EPA 832-R-92-006, Office of Water, September 1992, ("BMP Guidance Manual") at 1-3. In a BMP titled, "Vehicle Washing," the BMP Guidance Manual recommends that facilities wash vehicles with a high pressure water spray and no detergent additives as "water will adequately remove contaminants from the vehicle." *Id.* at 4-49.

[2] EPA also included rinsing in equipment cleaning when it promulgated the 1995 Multi-Sector General Permit for Industrial

Storm Water Discharges ("1995 Permit"). This was the first General Permit for industrial storm water discharges with specific requirements for various industrial sectors. 60 Fed. Reg. 50,804, 50,808 (September 29, 1995). In describing activities at transportation facilities, the Agency stated that: "Equipment cleaning operations include areas where the following types of activities take place: vehicle exterior wash down, interior trailer washouts, tank washouts, and rinsing of transfer equipment." *Id.* at 50,977 (emphasis added).<sup>5</sup>

[2] In the Sector P Fact Sheet which describes the transportation sector, EPA stated that "[e]quipment cleaning operations include areas where the following types of activities take place: ". . . Rinsing of transfer equipment." Sector P Fact Sheet at page 2 (emphasis added).

**(3) (a) - Explain the applicability, if any, to the facts of this case of the example taken from EPA's 1992 Question and Answer Document, in which EPA stated that "[o]nly nontransient vehicle maintenance shops are included in the transportation category," and thus repairs along a railroad system (including, presumably, a single, one-time repair, regardless of magnitude) are not**

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<sup>5</sup> In addition, as this case involves the enforcement of the California General Permit for Industrial Storm Water Discharges, NPDES General Permit No. CAS000001/Water Quality Order No. 97-03-DWQ ("CA General Permit"), provisions of that permit are relevant: "One of the major elements of the [Storm Water Pollution Prevention Plan] is the elimination of unauthorized non-storm water discharges to the facility's storm drain system. Unauthorized non-storm water discharges can be generated from a wide variety of potential pollutant sources. They include waters from the rinsing or washing of vehicles, equipment." CA General Permit at IX.

**regulated as "vehicle maintenance" in a "shop." See Q&A Volume 1, Question #32.**

Question #32 is not applicable to the facts of this case. As indicated in Question #32, EPA considered "repairs along a railroad system" to be "transient" implying the unlikelihood that repairs would happen in the same place twice along long, and potentially remote, railroad systems. In the context of railroad systems, it is logical to conclude that by the use of the word "transient" in the answer, EPA understood that such activities can occur randomly anywhere along the rail lines. As described earlier, EPA was concerned about areas that could become "repositories for pollutants such as oil and grease from machinery or vehicles." Fed. Reg. 47,990, 48,009 (November 16, 1990). While not explicit in Q&A Volume 1, it is unlikely that repairs along a railroad system would repeatedly occur at the same location.<sup>6</sup> Thus, it is unlikely that such random locations would become "repositories" for pollutants, and are therefore do not trigger permit application requirements.

Such an example is different than the activities at issue in this case. San Pedro Forklift did not conduct "repairs along

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<sup>6</sup> However, if a railroad operator established a non-transient location for maintenance along the railroad system, such a facility would be a train yard and would trigger a requirement for a permit application. See 55 Fed. Reg. 47,990, 48,013.

a railroad system." Rather, San Pedro Forklift is a relatively compact 2.8 acre facility. Compl. PHE Ex. 11 at 2, see also Init. Dec. at 7. Vehicle and equipment maintenance take place at this facility. Init. Dec. at 25 and 29. Unlike a transient maintenance activities occurring randomly along a railroad line, this facility has a non-transient maintenance shop. As such, it is included in the transportation category.

Thus, the discussion of transient vehicle maintenance along a railroad system is not relevant to determining whether San Pedro Forklift is transportation facility with a vehicle maintenance shop or equipment washing operations under 40 C.F.R. § 122.26(b)(14)(viii).

**(3)(b) - Discuss whether any similar kinds of examples exist for "equipment cleaning operations."**

EPA is not aware of any similar examples for equipment cleaning operations.

**(4)(a) - Address whether the concept of "accumulation" should be factored into interpretations of the regulatory terms "vehicle maintenance shops" and "equipment cleaning operations." For instance, the notion of pollutants "accumulating" in discrete, nontransient locations is suggested in EPA's discussion of industrial storm water discharges in the preamble to the final rule and EPA's Q&A Document. See, e.g., 55 Fed. Reg. 47,990, 48,009. (Nov. 16, 1990); Q&A Volume 1, Questions 32 & 34. Include citations to and copies of relevant statutory, regulatory, and/or commonlaw authority.**

The concept of accumulation should not be factored into interpretations of "vehicle maintenance shops" or "equipment cleaning operations." While the concept of "accumulation" was a factor in the Agency's decision to include transportation facilities with these activities in 40 C.F.R. § 122.26(b)(14), it is not relevant when determining if a specific facility is covered by the regulations.

As noted by the Board, accumulation of pollutants was noted in the preamble to the final Phase I rule as one reason for including access roads and rail lines located within a facility and for including roofed maintenance facilities as industrial activity. 55 Fed. Reg. 47,990, 48,009 (Nov. 16, 1990). In disagreeing with comments that road drainage and railroad drainage within a facility should not be considered industrial activity, the Agency stated that: "[a]ccess roads and rail lines (even those not used for loading and unloading) are areas that are likely to accumulate extraneous materials from raw materials [. . .]. These areas will also be 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." *Id.* Similarly, the Agency disagreed with comments that roofed maintenance facilities at sites identified by any of the listed SIC codes should be excluded from the definition of

"associated with industrial activity," because these areas are locations where oil, grease, solvents and other materials associated with maintenance activities will accumulate." *Id.*

The aforementioned preamble language to the Phase I rule indicates that the concept of "accumulation" is an underlying factor that caused certain areas at industrial sites generally to be included as areas from which storm water is "associated with industrial activity." However, while it speaks to the rationale for the general determination made by the Phase I rulemaking as to what types of facilities are "engaged in industrial activity", neither the rule itself nor the preamble language establish that some threshold of accumulated pollutants must exist on a site-specific basis before applying the rule to a particular site to determine whether a facility falls into one or more of these categories.

**(4) (b) - Also, if pollutant accumulation in a nontransient area were adopted as relevant factors for assessing whether a transportation facility has a "vehicle maintenance shop" or "equipment cleaning operations," explain the implications that follow therefrom.**

As discussed above, the concept of accumulation was relevant to the inclusion of the category of transportation facilities with vehicle maintenance shops or equipment cleaning operations as industrial activity in the Phase I regulations.



However, accumulation should not be adopted as a factor in determining whether a specific transportation facility with a vehicle maintenance shop or equipment cleaning operations is required to submit a permit application.

The rule contains objective criteria for determining whether a transportation facility classified under a relevant SIC code is "associated with industrial activity" for purposes of industrial stormwater permits, i.e., whether the facilities have "vehicle maintenance shops, equipment cleaning operations, or airport deicing operations." 40 C.F.R. §122.26(b)(14)(viii). There are no thresholds for, e.g., the number of vehicles at a facility, the frequency with which they are maintained or cleaned, or the level of pollutants accumulated. Whether the facility has a vehicle maintenance shop or equipment cleaning operations is simply established through the presence of on-site vehicle maintenance or equipment cleaning. "Vehicle maintenance refers to the rehabilitation, mechanical repairing, painting, fueling, and lubricating of instrumentalities of transportation *located at the described facilities.*" 55 Fed. Reg. at 48013 (emphasis added).

There are several reasons why "accumulation" should not be adopted as a factor in determining whether a given facility discharges stormwater associated with industrial activity.

First, taking pollutant accumulation into consideration would introduce a *de minimus* element into the NPDES storm water program, a concept that has been flatly rejected. Courts have specifically held that where EPA has decided that an activity is industrial in nature, "EPA is not free to create exemptions from permitting requirements for such activity." NRDC v. EPA, 966 F.2d 1292, 1306 (holding that EPA's decision to not require permit applications from construction sites smaller than five acres was arbitrary and capricious). Secondly, accumulation of pollutants from vehicle maintenance and equipment cleaning is one, but not the only, way in which stormwater mobilizes pollutants from these areas. While it is reasonable to expect that vehicle maintenance and equipment cleaning will occur with some degree of regularity at facilities with "vehicle maintenance shops" or "equipment cleaning areas," precipitation can mobilize pollutants and discharge them to waters of the U.S. any time it rains, even after one vehicle maintenance or equipment cleaning event. Again, it is the on-site location that is relevant, because that indicates repeated or regular activity, not only or always pollutant accumulation.

Additionally, considering pollutant accumulation as a factor would create uncertainty for all concerned - facilities, regulators, and interested citizens. How much is "enough" to

trigger applicability of the rule? Over what period of time should "accumulation" be considered? Should accumulation be factored differently for large facilities than for small facilities, and if so, where should the line be drawn? These are just some of the questions that would arise if each transportation facility classified under a relevant SIC code had to ascertain whether its on-site vehicle maintenance or equipment cleaning operations was enough to make it subject to the stormwater permitting requirements.

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

Under the Clean Water Act, if a transportation facility that does not have a vehicle maintenance shop, equipment cleaning operation or airport deicing operation discharges "a significant quantity of pollutants" to a municipal separate storm sewer system ("MS4"), EPA would have limited remedies or causes of action available.

First, if the MS4 is a large or medium MS4 ("Phase I MS4"), the Phase I MS4 should be required under its NPDES permit to have the authority to respond to, and prevent, discharges of pollutants. Phase I MS4s must have adequate legal authority to "[p]rohibit through ordinance, order or similar means, illicit discharges to the MS4" and to control discharges to the MS4 of "spills, dumping or disposal of materials other than storm water." 40 C.F.R. §§ 122.26(d)(2)(i)(B) and (C).<sup>7</sup> Further, the Phase I MS4 should be required under its NPDES permit to have a management program to prevent certain discharges into its system. 40 C.F.R. §§ 122.26(d)(2)(iv)(B) and (C). Thus, depending upon the terms of the MS4 permit, EPA may have a cause of action against the MS4 for the discharge.

If there were a "dry weather discharge" of pollutants to a water of the United States, EPA could enforce against the facility for discharging without a permit. If, however, the pollutants were washed into the system by storm water, there would be no violation of section 301, because only certain storm water discharges are prohibited unless permitted, i.e., those

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<sup>7</sup> 40 C.F.R. § 122.26(d)(2)(i)(A) also requires large and medium MS4s to have adequate legal authority, through statutes or ordinance, to control "the contribution of storm water discharges associated with industrial activity;" presumably this provision would not require the MS4 to regulate the hypothetical discharge because the discharge would not be "associated with industrial activity."

listed under CWA section 402(p)(2) -- industrial storm water discharges, regulated MS4 discharges, "small construction activity" storm water discharges, and any storm water discharges designated under sections 402(p)(2)(E) or 402(p)(6).<sup>8</sup>

In addition, §504 of the Clean Water Act grants the Administrator emergency powers to bring suit in federal court to immediately restrain the contribution by "any pollution source" to an "imminent and substantial endangerment" to the health or welfare of persons. The Agency also may have authority under §311 of the Clean Water Act if the discharge was of oil (in harmful quantities as defined by 40 C.F.R. § 110.3) or a hazardous substance (as defined by § 311(14)).

Dated: September 28, 2012

Respectfully submitted,



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<sup>8</sup> EPA has authority through adjudication to designate additional sources of storm water under CWA § 402(p)(2)(E) and 40 C.F.R. §§ 122.26(a)(9)(C)&(D) or undertake rulemaking to designate additional sources of storm water under 402(p)(6). Environmental Defense Center v. US EPA, 344 F.3d 832, 844, 876 (9th Cir. 2003).



**CERTIFICATE OF SERVICE**

I hereby certify that on this 28<sup>th</sup> day of September, 2012:

A copy of Appellant's Supplemental Brief was sent to Appellee, by certified mail, return receipt requested. Addressed as follows:

Ernest J. Franceschi, Jr.  
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A copy of Appellant's Supplemental Brief was also sent by first class mail addressed as follows:

Honorable Barbara J. Gunning  
Administrative Law Judge (1900L)  
Office of the Administrative Law Judges  
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Dated: September 28, 2012

By: 

Office of Regional Counsel  
USEPA, Region IX

