



**IN RE SAN PEDRO FORKLIFT, INC.**

CWA Appeal No. 12-02

**FINAL DECISION AND ORDER**

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Decided April 22, 2013

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Syllabus

Region 9 (“Region”) of the United States Environmental Protection Agency (“EPA” or “Agency”) appeals from Administrative Law Judge Barbara A. Gunning’s (“ALJ”) Initial Decision in *In re San Pedro Forklift*, Docket No. CWA-09-2009-0006, issued January 27, 2012. The decision dismissed a complaint the Region had filed against San Pedro Forklift, Inc. (“San Pedro”) of Long Beach, California, alleging the following three counts of violation of the Clean Water Act’s (“CWA”) storm water program: (1) unlawful discharges of “storm water associated with industrial activity” to waters of the United States without a CWA permit authorizing the discharges, in violation of CWA § 301(a), 33 U.S.C. § 1311(a), and 40 C.F.R. § 122.26(b)(14)(viii); (2) failure to apply for a CWA permit prior to commencing industrial activities, in violation of CWA § 308(a), 33 U.S.C. § 1318(a), and 40 C.F.R. § 122.21; and (3) failure to develop and implement a storm water pollution prevention plan and a storm water monitoring plan prior to commencing industrial activities, in violation of the State of California’s general permit for industrial storm water discharges.

After a six-day evidentiary hearing, the ALJ held that the Region failed to prove that San Pedro was regulated under 40 C.F.R. § 122.26(b)(14)(viii) as a “transportation facility” having a “vehicle maintenance shop” and/or “equipment cleaning operations.” Storm water discharges from such facilities are considered “discharges associated with industrial activity” and lawfully may occur only in accordance with a permit issued under section 402(p) of the CWA, 33 U.S.C. § 1342(p), which San Pedro did not have in the period alleged

in the complaint. Accordingly, the ALJ dismissed the complaint for lack of regulatory jurisdiction.

On appeal, the Region asks the Environmental Appeals Board (“Board”) to reverse and remand the Initial Decision, claiming that the ALJ erred by dismissing the complaint on the basis of an unreasonably narrow interpretation of the term, “associated with industrial activity,” and the related terms, “vehicle maintenance shop” and “equipment cleaning operations.” San Pedro argues that the ALJ did not err and asks the Board to affirm the Initial Decision.

Held: The ALJ erred in defining the regulatory terms, “vehicle maintenance shop” and “equipment cleaning operations,” too narrowly and inconsistent with the purpose and intent of the CWA, the storm water regulations, and the Agency’s own interpretation of the regulations, as expressed in the preamble to those rules and Agency guidance documents. The Board holds that the term, “*vehicle maintenance shop*,” in the storm water regulations refers to *a nontransient area or location that is designated for use for vehicle maintenance or in which vehicle maintenance is conducted on a regular or repeated basis, including intermittently or sporadically*. The Board holds further that the term, “*equipment cleaning operations*,” in the storm water regulations refers to *cleaning of industrial equipment anywhere on a facility’s site pursuant to a business process or practice for equipment cleaning*. The Board rejects as overbroad the Region’s interpretation that evidence of any on-site vehicle maintenance or equipment cleaning activities alone can establish the required elements of “vehicle maintenance shop” or “equipment cleaning operations,” respectively.

With respect to Count 1, after evaluating all the evidence in the administrative record and applying the interpretive standards set forth above, the Board affirms the ALJ’s finding that the Region failed to prove that San Pedro had a vehicle maintenance shop on its premises, but reverses her finding that the Region failed to prove that San Pedro conducted equipment cleaning operations at its facility. The Board holds that the evidence establishes that San Pedro conducted an equipment

cleaning operation on May 17, 2007, pursuant to the company's cleaning practices, and subsequently discharged storm water associated with industrial activity without a permit on three days within the period of violation alleged in the complaint. The Board assesses an administrative penalty of \$7,200 for these CWA violations.

With respect to Count 2, the Board holds that on the facts of this case, it would not impose a separate penalty for failing to apply for a permit prior to commencing industrial activity, even if it were to conclude it had authority to do so. Accordingly, the Board rules that it need not resolve the underlying legal question of whether failure to apply for a permit is a violation of section 308(a) of the CWA.

Finally, with respect to Count 3, the Board holds that the Region did not prove by a preponderance of the evidence that San Pedro failed to develop and implement a storm water pollution prevention plan and a storm water monitoring plan within the alleged period of violation.

*Before Environmental Appeals Judges Leslye M. Fraser, Catherine R. McCabe, and Kathie A. Stein.*

*Opinion of the Board by Judge Leslye M. Fraser:*

I. STATEMENT OF THE CASE

Region 9 ("Region") of the United States Environmental Protection Agency ("EPA" or "Agency") seeks reversal and remand of Administrative Law Judge Barbara A. Gunning's ("ALJ") Initial Decision in *In re San Pedro Forklift*, Docket No. CWA-09-2009-0006, issued January 27, 2012. The decision dismissed a complaint that the Region had filed against San Pedro Forklift, Inc. ("San Pedro") of Long Beach, California, alleging three counts of violation of the Clean Water Act's ("CWA" or "Act") storm water program.

Count 1 alleged that on at least fifty-seven occasions between October 1, 2004, and December 24, 2007, San Pedro violated section 301(a) of the CWA, 33 U.S.C. § 1311(a), and EPA's storm water

regulations governing discharges associated with industrial activity, 40 C.F.R. § 122.26(b)(14), by discharging pollutants into waters of the United States without a CWA permit. Count 2 alleged that San Pedro violated section 308(a) of the CWA, 33 U.S.C. § 1318(a), and 40 C.F.R. § 122.21, by failing to apply for a CWA permit prior to commencing industrial activities. Count 3 alleged that San Pedro violated the State of California's general permit for industrial storm water discharges by failing to develop and implement a storm water pollutant prevention plan ("SWPPP") and a storm water monitoring program plan prior to commencing industrial activities. The Region alleged that the nature, circumstances, extent, and gravity of the violations were "significant," and thus it sought assessment of a civil administrative penalty of \$177,500 against San Pedro.<sup>1</sup>

The ALJ held that liability for the allegations in the complaint would not attach unless the Region proved by a preponderance of the evidence that San Pedro was regulated under 40 C.F.R. § 122.26(b)(14)(viii) as a "transportation facility" having: (a) one of certain specified Standard Industrial Classification ("SIC") codes; and (b) a "vehicle maintenance shop" and/or "equipment cleaning operations." Storm water discharges from facilities with these characteristics are considered "discharges associated with industrial activity" and are subject to CWA permit requirements. The ALJ assumed without deciding that the SIC code requirement was fulfilled, but she found that the Region failed to carry its burden of proving that San Pedro had either a "vehicle maintenance shop" or "equipment cleaning operations." Consequently, the ALJ held that San Pedro was not liable as charged and dismissed the complaint for lack of regulatory jurisdiction under 40 C.F.R. § 122.26(b)(14)(viii).

On appeal to the Environmental Appeals Board ("Board"), the Region claims the ALJ erred by dismissing the complaint on the basis of

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<sup>1</sup> After the evidentiary hearing in this case (discussed in Part V below), the Region reduced the penalty amount sought to \$120,000. EPA Region 9's Brief in Support of Complainant's Proposed Findings of Fact and Conclusions of Law at 55 (filed May 20, 2011) ("R9 Post-Hearing Br.").

an unreasonably narrow interpretation of the term, “associated with industrial activity.” It argues that in the course of analyzing whether the evidence indicated that San Pedro had a “vehicle maintenance shop” or “equipment cleaning operations” at its facility, the ALJ created an array of “narrative standards” by which to assess that evidence. The Region asserts that these “narrative standards” are not supported by the regulations, the regulatory history, or Agency guidance, and that their inherent narrowness and ambiguity will cause implementation and policy problems for EPA. The Region therefore asks the Board to reverse the ALJ’s Initial Decision and remand the case for a new evaluation of liability and appropriate penalty that is consistent with the storm water program.

For the reasons explained below, the Board affirms the ALJ’s decision in part and reverses it in part.

## II. *ISSUE ON APPEAL*

The question presented in this appeal is whether the ALJ erred in dismissing the complaint for lack of regulatory jurisdiction under 40 C.F.R. § 122.26(b)(14)(viii), based on her finding that the Region failed to prove, by a preponderance of the evidence, that San Pedro Forklift operated a “vehicle maintenance shop” or conducted “equipment cleaning operations” and thus was required to obtain a storm water discharge permit.

## III. *SUMMARY OF DECISION*

The Board concludes:

- (1) The ALJ erred in defining the regulatory terms “vehicle maintenance shop” and “equipment cleaning operations” too narrowly and inconsistent with the purpose and intent of the CWA, the storm water regulations, and the Agency’s own interpretation of the regulations, as expressed in the preamble to those rules and Agency guidance documents.

- (2) San Pedro is liable for discharging storm water associated with industrial activity without a permit on three separate occasions, for which the Board assesses a penalty of \$7,200.
- (3) On the facts of this case, the Board would not impose a separate penalty for failing to apply for a permit prior to commencing industrial activity even if the Board were to conclude it had authority to do so; thus, the Board need not resolve the underlying legal question of whether failure to apply for a permit is a violation of section 308(a) of the CWA; and
- (4) The Region did not prove by a preponderance of the evidence that San Pedro failed to develop and implement a Storm Water Pollution Prevention Plan and a storm water monitoring plan within the alleged period of violation.

#### IV. JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to adjudicate this Class II administrative penalty appeal<sup>2</sup> under section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and sections 22.1(a)(6) and 22.30(a) of the Agency's Consolidated Rules of Practice, 40 C.F.R. part 22. The Board reviews an administrative law judge's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.30(f) (the Board shall "adopt, modify, or set aside" the ALJ's findings of fact and conclusions of law or exercise of discretion); *see* Administrative Procedure Act § 8(b), 5 U.S.C. § 557(b) ("[o]n appeal from or review of the initial decision, the agency has all the powers [that] it would have in making the initial decision except as it may limit the issues on notice or by rule"). In so doing, the Board typically will grant deference to an administrative law

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<sup>2</sup> For violations set forth in CWA § 309(g)(1), the CWA establishes two classes of administrative penalties: Class I, which may not exceed \$10,000 per day, up to a maximum penalty of \$25,000, and Class II, which may not exceed \$10,000 per day, up to a maximum penalty of \$125,000. CWA §§ 309(g)(2)(A)-(B), 33 U.S.C. §§ 1319(g)(2)(A)-(B). These numbers have been adjusted upward to \$11,000/\$32,500 for Class I and \$11,000/\$157,500 for Class II, due to inflation. *See* 40 C.F.R. § 19.4 tbl. 1 (list of revised penalties).

judge's determinations regarding witness credibility and the judge's factual findings based thereon. *See, e.g., In re Euclid of Va., Inc.*, 13 E.A.D. 616, 673-75 (EAB), *appeal voluntarily dismissed*, No. 08-1088 (D.D.C. Oct. 21, 2008); *In re Cutler*, 11 E.A.D. 622, 640-41 (EAB 2004); *In re City of Salisbury*, 10 E.A.D. 263, 276, 293-96 (EAB 2002). All matters in controversy must be established by a preponderance of the evidence. 40 C.F.R. § 22.24(b); *see, e.g., In re Mayes*, 12 E.A.D. 54, 62, 87-88 (EAB 2005), *aff'd*, No. 3:05-CV-478, 2008 WL 65178 (E.D. Tenn. Jan. 4, 2008); *In re Phoenix Constr. Servs.*, 11 E.A.D. 379, 404 (EAB 2004); *In re Britton Constr. Co.*, 8 E.A.D. 261, 274 (EAB 1999).

#### V. FACTUAL AND PROCEDURAL HISTORY

For more than a decade, San Pedro Forklift has leased a nearly three-acre tract of land in Long Beach, California, from the Port of Los Angeles. Administrative Hearing Transcript ("Tr.") at 287, 327-28; Complainant's Exhibits ("CX") 35, 37. Most of the property is covered by a paved, impervious surface, with a covered loading dock situated along the eastern edge of the tract. The loading dock is flanked by two warehouses and backed by a railroad line that runs north and south. Tr. at 93; CX 11 figs. 1-2, at 5-6. San Pedro has conducted a variety of activities at the site over the years, including, primarily, the "transloading" (i.e., transferring) of goods from one mode of transportation (such as ocean shipping containers) to another (such as tractor-trailers), for export and import. Tr. at 194-95, 1413-24, 1911, 1916-18, 2168-70; *see* CX 12, 33, 35. The company uses forklifts, a truck, yard goats (a form of small rig or truck), and other equipment and machinery to conduct its transloading operations. CX 12, at 7. San Pedro also fumigates shipments of fruit, vegetables, flowers, and other produce at the site, under the supervision of the United States Department of Agriculture ("USDA"). Tr. at 1911-41; CX 12, at 4.

Two storm drains are situated near the southern boundary of the property. These drains divert storm water that flows across the facility's surfaces into the City of Los Angeles' municipal separate storm sewer system, which discharges approximately 1,000 feet west into the Dominguez Channel. Tr. at 538, 541-42, 554, 658; CX 11, at 3, 7. That

channel drains directly into Los Angeles Harbor and San Pedro Bay and ultimately into the Pacific Ocean. Tr. at 732-34; CX 53, fig. 2-7, at 2-28.

In 2004, EPA commenced a national priorities initiative that targeted ports as an area of focus for storm water enforcement. San Pedro, a port tenant, fell within the scope of this initiative, and Region 9 inspected the facility on May 17, 2007, and again on August 18, 2009. After each inspection, the Region issued an administrative compliance order, directing San Pedro to take specific actions to come into compliance with the CWA. *See* CX 28-29 (compliance orders). After the May 2007 inspection, San Pedro filed a notice of intent to be covered under the State of California's general industrial storm water permit, and, on December 24, 2007, San Pedro received authorization to discharge industrial storm water in accordance with that permit. *See* State of California Water Resources Control Board, Water Quality Order No. 97-03-DWQ, [NPDES] General Permit No. CAS000001, *Waste Discharge Requirements for Discharges of Storm Water Associated with Industrial Activities* (CX 27); Letter from State of California Water Resources Control Board to San Pedro Forklift, Inc. (Dec. 24, 2007) (CX 4) (authorizing San Pedro to discharge industrial storm water in accordance with the general permit). San Pedro also prepared a SWPPP and a storm water monitoring plan, both finalized on January 23, 2008, and took other site clean-up and containment measures in response to EPA's orders.<sup>3</sup> *See* Frog Environmental, Inc., *San Pedro Forklift, Inc., Storm*

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<sup>3</sup> Both before the ALJ and in this appeal, San Pedro has argued that "it was not and is not required to have a storm water permit" because:

[San Pedro] conducts no activities that come within the regulatory jurisdiction of the EPA under the [CWA]. Moreover, the SIC Code most applicable to [the company's] operations (no. 4213) does not require a Storm Water Permit under the Act. Nevertheless, and solely out of a desire to avoid the costs and undue consumption of time that this litigation has required, [San Pedro], without any legal obligation to do so, filed [a Notice of Intent] and promulgated a storm water program.

Respondent's Brief at 2 (filed June 20, 2012) ("San Pedro Resp. Br."); *see also* (continued...)

*Water Pollution Prevention Plan* (Jan. 23, 2008) (CX 12) (SWPPP and monitoring plan); Letter from John C. Glaser, Glaser, Tonsich & Associates LLP, to Mike Massey, Regional Counsel, EPA Region 9, at 3-4 (Dec. 12, 2007) (CX 31) (describing best management practices implemented on site); Letter from John C. Glaser, Glaser, Tonsich & Associates LLP, to Mike Massey, Esq. & Rick Sakow, EPA Region 9 (Feb. 7, 2008) (CX 35) (site photographs).

On September 29, 2009, finding San Pedro to still not be in compliance with the Act or the general permit, the Region filed an administrative complaint against the company, alleging three counts of violation of the CWA: (1) discharges of pollutants to waters of the United States without a permit; (2) failure to apply for a permit prior to commencing industrial activity; and (3) failure to develop and implement a SWPPP and a storm water monitoring program, as required by the storm water permit. *See* Compl. ¶¶ 28-48, at 6-9. In the complaint, the Region made no specific allegations about San Pedro having a “vehicle maintenance shop” or “equipment cleaning operations” on its premises.<sup>4</sup> The Region did allege, however, that storm water runoff from the facility contained “‘pollutants,’ including industrial waste,” which the facility unlawfully discharged into waters of the United States on fifty-seven days within the period of violation.<sup>5</sup> *Id.* ¶¶ 32-36, at 7. “Given the condition of the facility,” the Region continued, “EPA believes it is

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<sup>3</sup>(...continued)

Respondent’s Brief in Support of Findings of Fact and Conclusions of Law at 1 (filed May 26, 2011) (“San Pedro Post-Hearing Br.”).

<sup>4</sup> Instead, the Region alleged, among other things, that during EPA’s May 2007 inspection of San Pedro’s facility, the inspectors “observed sources of pollutants (oil and batteries, 55-gallon drums, obsolete equipment stored outdoors with no cover or containment) exposed to storm water, poor housekeeping (trash in the yard) and large pavement stains, indicating prior spills that were not properly addressed.” Compl. ¶ 23, at 5.

<sup>5</sup> In its post-hearing brief, the Region reduced the number of days of violation to 49 days based on its expert’s modeling data and rainfall data collected at Long Beach’s Daugherty Field Airport, which is located near the San Pedro facility. R9 Post-Hearing Br. at 22-23.

likely that storm water discharges from this facility contained oil and metals.” *Id.* ¶ 51, at 10. The Region proposed a penalty of \$177,500 for the alleged violations. *Id.* ¶ 53, at 10. On November 13, 2009, San Pedro filed an answer denying the allegations in the complaint, denying that a permit was required for its operations, and requesting an administrative hearing.

The ALJ presided over a six-day hearing in the case, from January 24 through 29, 2011, at which the parties presented witnesses and documentary evidence. Ms. Amy Miller, EPA’s lead storm water inspector, testified that during the May 2007 inspection, she observed large trucks and forklifts on the property, forklifts moving goods between the loading dock and the trucks, and goods being stored in the main paved yard area. Tr. at 93, 131, 243. She also found two fifty-five-gallon blue metal drums sitting on wooden pallets in the northeastern portion of the facility. One drum was coated almost completely with a black oily substance that exuded a petrochemical odor of some kind, and dark stains were present on the wall behind that drum and on the pallet and concrete underneath the drum. Tr. at 95-96, 107-09; CX 14, photo 7. The other drum was comparatively clean, but, unlike the coated drum, the clean drum had a large pump on its lid. Tr. at 110-12, 298-99; CX 14, photo 6. Ms. Miller testified that several smaller buckets or containers near each blue drum also appeared to contain petroleum products of some kind, and several containers near the clean drum had spouts, presumably for pouring. Tr. at 96, 107, 110-11, 146-47, 301; CX 14, photos 6-7. She also testified that the area generally smelled like oil. Tr. at 95-96, 107-08. Ms. Miller did not offer any direct evidence regarding how these materials were used (e.g., such as in what equipment or in which vehicles) at the San Pedro facility. *See* Tr. at 88-263, 409-525; Initial Decision (“Init. Dec.”) at 23.

In addition, Ms. Miller testified that she found piles of metal poles and other scrap metal items, a large automobile-type battery on a pallet, painting equipment, stacks of baled plastic, uncovered trash and debris of various kinds, and pavement stains (of the type typically caused by oil or fluid leaks from motor vehicles) scattered all over the facility grounds. Tr. at 114-17, 120-23, 131-32, 349; CX 14, photos 3-5, 10.

She also testified that when she arrived for the May 2007 inspection, she saw a man hosing off a forklift parked on the loading dock, using what appeared to be a garden hose to rinse the forklift's exterior. Tr. at 118-19, 131-32, 231-33, 236-37, 2222-23, 2236-38, 2241-42. She later saw men using brooms to push the washwater off both sides of the loading dock.<sup>6</sup> Tr. at 119, 132, 2229, 2236; *see* CX 14, photo 8. Finally, Ms. Miller testified that during the August 2009 inspection, she found more than two dozen large tires stacked by the northwestern perimeter fence.<sup>7</sup> *E.g.*, Tr. at 443-45; CX 16, photo 14. Ms. Miller stated that her collective observations from both inspections led her to believe that San Pedro was conducting maintenance at the facility. Tr. at 242, 255, 431.

The Region also introduced San Pedro's SWPPP, which the company finalized in early 2008 (i.e., after the Count 1 period of violation identified in the Region's 2009 complaint). The SWPPP stated that San Pedro stored diesel fuel, engine oil, hydraulic fluid, transmission fluid, coolant, bromide, and propane on site and that these materials were "necessary" for San Pedro's daily operations. SWPPP at 8 ("Significant Materials List"). The SWPPP also identified the forklifts, yard goats, truck, and other machinery and equipment necessary for San Pedro's operations as "Operational Equipment." *Id.* at 7. In a list of "Existing Nonstructural [Best Management Practices]" for that equipment, the SWPPP reported that "[a]ll Operational Equipment is well maintained by an outside company," and that "Operational Equipment is inspected on a regular basis for fluid leaks or drips and repaired immediately if

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<sup>6</sup> Mr. Renato Balov, San Pedro's co-owner and Chief Operations Officer, testified at the hearing that the water on the loading dock was condensation outflow from an adjacent produce container, and that no washing of a forklift had occurred. Tr. at 1979-88. Despite San Pedro's arguments to the contrary, *see* San Pedro Resp. Br. at 22-27, the Board finds that the ALJ clearly stated in her Initial Decision that she found San Pedro's arguments "unpersuasive," and instead found Ms. Miller's testimony regarding her observations to be "credible." *Init. Dec.* at 36-37; *see id.* at 32 n.21.

<sup>7</sup> Mr. Balov testified at the hearing that the tires were not used for vehicles, but to secure tarpaulin covers during fumigation activities, pursuant to a requirement in the USDA's treatment manual. *See* Tr. at 1970-72, 2015-16, 2139. The Region did not offer any further evidence to support its contention that the tires were used for vehicle maintenance.

necessary.” *Id.* at 18. Mr. Terry Balog, a technical professional retained by San Pedro to prepare and implement the SWPPP, testified that he had never observed any outside company visiting San Pedro’s facility to maintain the operational equipment, but that “the forklift maintenance more than likely would be done on-site.” Tr. at 1884, 1887.

On cross-examination, San Pedro’s attorneys asked Ms. Miller whether she observed a “vehicle maintenance facility” on the premises, and they repeatedly pressed her to identify the specific locations on the site where she found the various purported indicia of maintenance activity. *See, e.g.*, Tr. at 348-52, 409-26, 441-56, 460-62. Ms. Miller responded by stating that she saw evidence that vehicles were being maintained at the facility, and that “it does not matter” where on the facility evidence of vehicle maintenance is observed, in terms of determining whether a facility is required to obtain a storm water permit. *See, e.g.*, Tr. at 242, 351, 502-03. Additionally, Ms. Miller admitted that she did not know whether the forklifts were maintained on site, nor did she know from which vehicle or equipment the battery she observed on a pallet had been taken. Tr. at 244-45, 254-55.

Mr. Mark Bulot, an expert witness for San Pedro, testified that he had questioned the company’s owners about “what they did in operating and maintaining their forklifts.” Tr. at 1611. They told him that “[b]asically, there is occasional topping off of hydraulic fluid and occasionally washing, you know, hosing off the dust,” and “that’s [pretty much] it.” *Id.* Mr. Anthony Severini, another expert witness for San Pedro, testified that San Pedro’s owners told him a third-party company periodically came on-site to conduct minor forklift maintenance, such as changing or topping off hydraulic oil, engine oil, and fuel, and then removed the used fluids from the site. Tr. at 1427-31. He also testified that San Pedro’s owners had told him that the facility’s operations “have been, essentially, unchanged for a decade.” Tr. at 1433. In addition, Mr. Renato Balov, one of San Pedro’s owners, testified that the forklifts were fueled on-site with propane gas. Tr. at 2181-82.

With respect to equipment cleaning, the SWPPP also states that:

The outside surfaces of the Trucks, Trailers, and Containers are cleaned regularly in order to minimize or eliminate any contact between operational fluids and storm water.

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The outside surfaces of the machinery *and equipment are cleaned regularly* in order to minimize or eliminate any contact between operational fluids and storm water.

SWPPP at 15, 18 (emphasis added). Upon cross-examination, Mr. Balov stated that contrary to the statements in the SWPPP, San Pedro did not clean trucks, trailers, or containers at the site, and if San Pedro did need to clean any of the operational equipment, it would rely on third parties for help. Tr. at 2119, 2122-23, 2125, 2181.

After a period of post-hearing briefing, the ALJ issued her Initial Decision on January 27, 2012, finding that the Region had failed to establish San Pedro's liability by a preponderance of the evidence, and accordingly dismissed the complaint. Init. Dec. at 29-31, 38-39. The ALJ assessed all of the evidence presented and held that it "supported the conclusion that [San Pedro] was conducting occasional activities that might properly be termed maintenance of vehicles and equipment. Nevertheless, the overall evidence adduced at hearing does not meet the definition of 'vehicle maintenance shop.'" *Id.* at 29. The ALJ also ruled that the Region had not established that San Pedro "was engaged in equipment cleaning operations that would trigger the jurisdiction of 40 C.F.R. § 122.26(b)(14)(viii)." *Id.* at 37.

In so ruling, the ALJ examined the plain meaning of the regulatory language and consulted a dictionary to determine the ordinary

meaning of “shop” and “operations.” *Id.* at 20, 31-32. She noted that “[g]iven the inclusion of [these] word[s], it is impossible to ignore that the regulation clearly contemplates that vehicle maintenance activities occur in the context of a ‘shop,’” and “that equipment washing activities must rise to the level of a business ‘operation’ before triggering the coverage of Paragraph (viii).” *Id.* at 20, 32. The ALJ held that the inclusion of the words, “shop” and “operations,” narrows the scope of the regulatory language, and that without them, the terms, “vehicle maintenance” and “equipment cleaning,” would have a “significantly broader reach.” *Id.*

The ALJ further found that the “record contains no evidence of a discrete structure used for the purpose of vehicle maintenance, nor was there sufficient evidence that [San Pedro] was engaged in an industrial establishment for the purpose of maintaining or repairing vehicles.” *Id.* at 30. She also stated that “[w]hile it is conceivable that [] the requirement for a maintenance ‘shop’ could be met by the presence of a sufficient volume, level, and concentration of outdoor repair activity, such facts [were] not present in the record before [her],” and that the “reference to volume is critical as it indicates EPA’s focus on operationally relevant activities.” *Id.* She also noted that even if forklifts were considered “vehicles” for purposes of the regulations, San Pedro “did not maintain a vehicle fleet or engage in the type of daily maintenance activities that would customarily require the presence of a dedicated maintenance shop.” *Id.* at 31 n.19.

With respect to the Region’s claim that San Pedro was engaged in equipment cleaning operations that would trigger the jurisdiction of 40 C.F.R. § 122.26(b)(14)(viii), the ALJ held that despite Ms. Miller’s credible testimony regarding seeing a man rinsing a forklift on the loading dock, and despite the statements in the SWPPP:

Neither of these sets of facts, independently or taken together, rise to the level of “equipment cleaning operations.” The term “equipment cleaning operations” connotes a

systematic process or “operation” that has a distinct commercial or organizational, though not necessarily profit-relevant, purpose for the regulated entity.

\* \* \* The regulations, when read in their entirety, contemplate regulation of sustained or organized operations, not one-off or incidental events. 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. Rather, these latter activities are akin to individual car washing.

Init. Dec. at 37. The ALJ also found that the Region “was unable to establish that any outside entity performed regular cleaning operations at San Pedro Forklift.” *Id.* at 35.

On April 27, 2012, the Region filed an appeal of the Initial Decision with the Board, seeking a remand. *See* Appellant’s Appeal Brief (“R9 Appeal Br.”). On June 20, 2012, San Pedro filed a response to the Region’s appeal. *See* Respondent’s Brief (“San Pedro Resp. Br.”). The Region subsequently filed a reply to San Pedro’s response, and the Board requested supplemental briefing. The parties submitted their supplemental briefs on September 28, 2012, and October 12, 2012, respectively. *See* Appellant’s Supplemental Brief (“R9 Suppl. Br.”); Respondent’s Reply to Appellant’s Supplemental Brief (“San Pedro Suppl. Br.”). The case now stands ready for decision by the Board.

## VI. STATUTORY AND REGULATORY HISTORY

A. *The Statute and Legislative History: Congress' Intent*

Section 301(a) of the CWA prohibits any person from discharging any pollutant from a point source to the waters of the United States, unless such discharge complies with specified provisions of the CWA. CWA §§ 301(a), 502, 33 U.S.C. §§ 1311(a), 1362. One such provision is section 402, 33 U.S.C. § 1342, which establishes the National Pollutant Discharge Elimination System (“NPDES”) permitting program. EPA or an authorized state may issue NPDES permits to water pollution sources, provided the sources fulfill all applicable requirements of the Act.<sup>8</sup> The NPDES program initially targeted industrial and municipal dischargers, but as time advanced and those sources became better controlled, Congress expanded the program to include other sources of water pollution. In 1987, Congress added section 402(p) to the statute, to begin addressing some of the most serious water pollution problems caused by storm water runoff. *See* Water Quality Act of 1987, Pub. L. No. 100-4, tit. IV, § 405, 101 Stat. 7, 69-71 (Feb. 4, 1987) (codified at 33 U.S.C. § 1342(p)).

Among other things, section 402(p) requires that entities with storm water discharges “associated with industrial activity” must obtain NPDES permits for those discharges. CWA § 402(p)(2)(B), (3)(A), 33 U.S.C. § 1342(p)(2)(B), (3)(A). The statutory record mostly is silent as to the meaning of the term “associated with industrial activity,” with

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<sup>8</sup> NPDES permits may be issued to individual dischargers or as general permits that apply to groups of similar dischargers. *See* 40 C.F.R. §§ 122.26(c)(1), .28. A general permit also may be issued by an EPA-approved state NPDES program, pursuant to CWA § 402(b), 33 U.S.C. § 1342(b), and 40 C.F.R. § 123.25. In 1973 and 1989, EPA authorized the State of California to implement elements of the federal NPDES program within state boundaries. *See* Approval of California’s Revisions to the State [NPDES] Program, 54 Fed. Reg. 40,664, 40,664-65 (Oct. 3, 1989). San Pedro applied for coverage under the California Statewide Storm Water General Permit on or about December 12, 2007, *see* CX 31, at 2, which the State granted on December 24, 2007. CX 4; *see* CX 27 (general permit). San Pedro reports that it filed a Notice of Termination to remove itself from coverage under the California General Permit, which the State granted on April 7, 2011. San Pedro Resp. Br. at 3.

neither the statute itself nor relevant congressional reports in the legislative record speaking to the issue. *See* CWA §§ 402(p), 502, 33 U.S.C. §§ 1342(p), 1362; *see, e.g.*, H.R. Rep. No. 99-1004 (1986); S. Rep. No. 99-50 (1985); H.R. Rep. No. 99-189 (1985). The congressional debates, however, provide the following interpretive instruction, repeated nearly verbatim by four members of Congress over a two-year period:

It is important \* \* \* 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 [that] do not meet this definition include those discharges associated with parking lots and administrative and employee buildings.

132 Cong. Rec. 31,964 (1986) (statement of Rep. Gene Snyder); *accord id.* at 31,968 (statement of Rep. James Rowland); 133 Cong. Rec. 985 (1987) (statement of Rep. John Hammerschmidt); 133 Cong. Rec. 991-92 (1987) (statement of Rep. Arlan Stangeland).

*B. The Regulations and Regulatory History: EPA’s Interpretation of Congress’ Intent*

In 1990, EPA promulgated regulations to begin implementing section 402(p). *See* National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 48,062-75 (Nov. 16, 1990) (codified in various sections of 40 C.F.R. pts. 122, 123, 124). In so doing, the Agency chose to define the term, “storm water discharge associated with industrial activity,” in part by “adopting the language used in the legislative history” (quoted above) and “supplementing it with a description of *various types of areas* that are directly related to an industrial process.” *Id.* at 48,007 (emphasis added). Thus, in the “Definitions” portion of section 122.26, the regulations provide the following:

**SAN PEDRO FORKLIFT, INC.**

*Storm water discharge associated with industrial activity* means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing[,] or raw materials storage areas at an industrial plant. \* \* \*

For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters \* \* \*; sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water.

For the purposes of this paragraph, material handling activities include storage, loading and unloading, transportation, or conveyance of any

raw material, intermediate product, final product, by-product, or waste product.

The term [*storm water discharge associated with industrial activity*] excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots[,] as long as the drainage from the excluded areas is not mixed with storm water drained from the above-described areas.

40 C.F.R. § 122.26(b)(14) (paragraph breaks added).

After this general introduction, the Agency lists eleven specific categories of facilities it considers engaged in "industrial activity." *See id.* § 122.26(b)(14)(i)-(xi). The category of relevance in the present case is set forth in subsection (b)(14)(viii), as follows:

Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 [that] 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 [that] are otherwise identified under paragraphs (b)(14)(i)-(vii) or (ix)-(xi)

of this section are associated with industrial activity.

*Id.* § 122.26(b)(14)(viii).

The regulations do not include definitions for the regulatory terms, “vehicle maintenance shop” and “equipment cleaning operations.” EPA did prepare, however, a detailed preamble to the final storm water rules that provided information on the regulations and EPA’s intended meaning of many of its provisions. *See* 55 Fed. Reg. at 47,990-48,062; *see also* 54 Fed. Reg. 49,416, 49,430-32 (proposed Dec. 7, 1988). In a section addressing the regulatory term, “storm water discharges associated with industrial activity,” the Agency elaborated on the scope of the statutory term, “associated with industrial activity,” set forth in CWA section 402(p). 55 Fed. Reg. at 48,007-15. As a foundational interpretive principle, the Agency referenced the congressional statements that a storm water discharge is so “associated” if it is “directly related to manufacturing, processing[, ] or raw materials storage areas at an industrial plant.” *Id.* at 48,007 (citing legislative history). The Agency then built upon that principle by describing specific types of areas that are directly related to an industrial process, stating:

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 application or disposal of process waters, sites used for the storage and maintenance of material handling equipment, and known sites that are presently or have been used in

the past for residual treatment, storage, or disposal).

*Id.* at 48,007 (emphasis added); *see id.* at 48,065 (codified at 40 C.F.R. § 122.26(b)(14)) (repeating, in modified form, this nonexhaustive listing of various types of areas deemed “associated with industrial activity” and thus requiring permits for storm water discharges therefrom).

The preamble also provided responses to specific questions stakeholders had raised during the comment period on the proposed rule. In one relevant example, numerous commenters had argued that covered (roofed) maintenance facilities should be excluded from the regulation because they purportedly do not pose a storm water problem. *Id.* at 48,009. EPA disagreed, observing that such facilities “will invariably have points of access and egress, and frequently will have outside areas where parts are stored and disposed of. Such areas are locations where oil, grease, solvents[,] and other materials associated with maintenance activities will *accumulate*,” and thus they are considered “associated with industrial activity.” *Id.* (emphasis added).

In another example, commenters argued that road or railroad drainage within a facility should be excluded from the regulation. *Id.* EPA again disagreed, explaining that “[a]ccess roads and rail lines \* \* \* are areas that are likely to *accumulate* extraneous material from raw materials, intermediate products[,] and finished products that are used or transported within, or to and from, the facility. These areas will also be *repositories for pollutants* such as oil and grease from machinery and vehicles using these areas. *As such they are related to the industrial activity at facilities.*” *Id.* (emphasis added). The Agency explicitly limited the regulation, however, to cover only those access roads and rail lines “used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility.” *Id.*

With respect to transportation facilities specifically, EPA provided the following information in the preamble:

**SAN PEDRO FORKLIFT, INC.**

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, or [that] are identified in another subcategory of facilities under EPA's definition of storm water discharges associated with industrial activity [are regulated]. One commenter requested clarification of the term[] "vehicle maintenance." Vehicle maintenance refers to the rehabilitation, mechanical repairing, painting, fueling, and lubricating of instrumentalities of transportation located at the described facilities. EPA is declining to write this definition into the regulation however since "vehicle maintenance" should not cause confusion *as a descriptive term*.

One commenter wanted railroad tracks where rail cars are set aside for minor repairs excluded from regulation. In response, if the activity involves any of the above activities then a permit application is required. Train yards where repairs are undertaken are associated with industrial activity. Train yards generally have trains [that], in and of themselves, can be classified as heavy industrial equipment. Trains, concentrated in train yards, are diesel fueled, lubricated, and repaired in volumes that connote industrial

activity, rather than retail or commercial activity.

One commenter argued that if gasoline stations are not considered for permitting, then all transportation facilities should be exempt. EPA disagrees with the thrust of this comment. 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 from such facilities are appropriate.

*Id.* at 48,013-14 (first paragraph break inserted) (emphasis added).

C. *Long-standing Agency Guidance Provides Further Information Regarding EPA's Interpretation of Its Storm Water Regulations*

After EPA promulgated the 1990 regulations, it issued several guidance documents that responded to commonly raised questions and/or provided information about the scope of the storm water program. In 1992-1993, the Agency issued two volumes of question-and-answer documents to explain the then-new program. *See* Office of Water, U.S. EPA, EPA Doc. No. 833-F-93-002, *NPDES Storm Water Program, Question and Answer Document Volume 1* (Mar. 1992) [hereinafter Q&A Vol. 1]; Office of Water, U.S. EPA, EPA Doc. No. 833-F-93-002B, *NPDES Storm Water Program, Question and Answer Document Volume 2* (July 1993) [hereinafter Q&A Vol. 2]. In 1995, the Agency submitted a report to Congress on the storm water program, which included an appendix that contained industry descriptions organized by industry sector. *See* Office of Water, U.S. EPA, EPA Doc. No. 833-K-

94-002, *Storm Water Discharges Potentially Addressed by Phase II of the [NPDES] Storm Water Program: Report to Congress* (Mar. 1995) [hereinafter 1995 Report to Congress]. And in 2006, the Agency issued a series of industrial storm water “fact sheets,” also organized by industry sector. *See, e.g.*, Office of Water, U.S. EPA, EPA Doc. No. 833-F-06-031, *Industrial Stormwater Fact Sheet Series, Sector P: Motor Freight Transportation* (Dec. 2006) [hereinafter Motor Freight Fact Sheet].

These documents contain various examples that indicate the Agency’s intent in implementing the industrial storm water program. For instance, in answer to a question whether a vehicle maintenance shop or an equipment cleaning facility must apply for an NPDES permit, the Agency responded in the affirmative, provided the facility has one of the relevant transportation SIC codes. The Agency clarified, however, that “[o]nly the vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication) and equipment cleaning areas (such as truck washing areas) must be addressed in the [permit] application.” Q&A Vol. 1 ¶ 22, at 9 (emphasis added). Such areas include “storage areas of materials used in vehicle maintenance or equipment cleaning operations and holding yards or parking lots used to store vehicles awaiting maintenance,” because those sites are also considered areas “associated with industrial activity.” Q&A Vol. 2 ¶ 23, at 9; *accord* Q&A Vol. 1 ¶ 34, at 12 (parking lots associated with vehicle maintenance shops are regulated, as their use to store vehicles prior to maintenance is considered “a component of the vehicle maintenance activity”); 1995 Report to Congress app. E, at E-36, -38. For widespread facilities, such as railroads, EPA stated that repairs in locations outside the designated maintenance areas are *not* regulated as “vehicle maintenance,” because “[o]nly nontransient vehicle maintenance shops are included in the transportation category.” Q&A Vol. 1 ¶ 32, at 12.

The Agency also explained that the term “equipment cleaning operations” includes “areas where the following types of activities take place: vehicle exterior wash down, interior trailer washouts, tank washouts, and rinsing of transfer equipment.” 1995 Report to Congress app. E, at E-36, -38; Motor Freight Fact Sheet at 2. Moreover, storage

areas for materials used in equipment cleaning operations also must be permitted, as they are deemed “associated with industrial activity.” Q&A Vol. 2, ¶ 23, at 9. Finally, the Agency provided an explanation of the term, “airport deicing operations,” stating that “[a]irports or airline companies must apply for a storm water discharge permit for locations where deicing chemicals are applied. This includes, but is not limited to, runways, taxiways, ramps, and areas used for the deicing of airplanes.” Q&A Vol. 1 ¶ 29, at 11.

## VII. ANALYSIS

The pivotal issue presented in this appeal is whether the ALJ erred in dismissing the complaint for lack of regulatory jurisdiction under 40 C.F.R. § 122.26(b)(14)(viii), based on her finding that the Region failed to prove by a preponderance of the evidence that San Pedro Forklift operated a “vehicle maintenance shop” or conducted “equipment cleaning operations” and thus was required to obtain a storm water discharge permit. The resolution of this issue involves two questions of regulatory interpretation: what is a “vehicle maintenance shop,” and what are “equipment cleaning operations”? In Part VII.A below, the Board interprets and clarifies what these terms mean, based on the statute, regulatory history, and EPA’s past interpretations provided in the preamble to the final rule and subsequent guidance documents.

### A. *The Board Finds That the ALJ Erred in Interpreting the Regulatory Terms, “Vehicle Maintenance Shop” and “Equipment Cleaning Operations”*

As the Board has explained in previous cases, “[w]hen construing an administrative regulation, the normal tenets of statutory construction are generally applied.” *In re Bil-Dry Corp.*, 9 E.A.D. 575, 595 (EAB 2001) (citing *Black & Decker Corp. v. Comm’r*, 986 F.2d 60, 65 (4th Cir. 1993)). “The plain meaning of words is ordinarily the guide to the definition of a regulatory term.” *Id.* (citing *T.S. v. Bd. of Educ.*, 10 F.3d 87, 89 (2d Cir. 1993)). “Additionally, the regulation must, of course, be ‘interpreted so as to harmonize with and further and not to

conflict with the objective of the statute it implements.” *Id.* (quoting *Emery Mining Corp. v. Sec’y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984)). Moreover, in interpreting a regulation, the Board examines not just the provision at issue, but the entire regulation. *In re U.S. Army, Fort Wainwright Cent. Heating & Power Plant*, 11 E.A.D. 126, 141 (EAB 2003) (“[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context”) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)); see *In re Harpoon P’ship*, 12 E.A.D. 182, 195-96 (EAB 2005), *appeal dismissed*, No. 05-2806 (7th Cir. Aug. 24, 2005); cf. *Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (“[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law”) (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)). Moreover, just as legislative history can be helpful in interpreting a statute, regulatory history, such as preamble statements, assists the Board in interpreting regulations. See *In re Friedman*, 11 E.A.D. 302, 328 (EAB 2004), *aff’d*, No. 2:04-CV-00517-WBS-DAD (E.D. Cal. Feb. 25, 2005). Last, the Board gives greater deference to a position when it is supported by Agency rulings, statements, and opinions that have been consistent over time. See *In re Howmet Corp.*, 13 E.A.D. 272 (EAB 2007), *aff’d*, 656 F. Supp. 2d 167 (D.D.C. 2009); *In re Lazarus, Inc.*, 7 E.A.D. 318, 352-53 (EAB 1997).

In a case where, as here, the regulations are silent on the meaning of the terms, “vehicle maintenance shop” and “equipment cleaning operations,” and where the federal courts have not spoken on the subject, the Board looks first to the plain meaning of the regulatory text, then considers the regulations as a whole, the regulatory history, and the Agency’s post-promulgation guidance documents on the topic. See, e.g., *Howmet*, 13 E.A.D. at 293-303; *In re Clarksburg Casket Co.*, 8 E.A.D. 496, 502-04 (EAB 1999). The Board concludes that the ALJ’s interpretations of these terms are unduly narrow, while the Region’s interpretation of these terms is overbroad, for the reasons explained below.

1. *The Regulatory Terms, “Vehicle Maintenance Shop” and “Equipment Cleaning Operations,” Must Be Read as a Whole*

The Board agrees with the ALJ that this case turns on the application of the “‘ancient and sound rule of construction that each word in a statute should, if possible, be given effect’ and ‘[a]n interpretation that needlessly renders some words superfluous is suspect,’” and that this interpretive principle also applies to construction of regulations. Init. Dec. at 19-20 (quoting *Crandon v. United States*, 494 U.S. 152, 171 (1990) (Scalia, J., concurring), and citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 823-24 (8th Cir. 2009); *Sekula v. FDIC*, 39 F.3d 448, 454 (3d Cir. 1994)). The ALJ rightly invoked these basic principles of interpretation to attempt to give meaning to the word, “shop,” used in the regulatory term, “vehicle maintenance shop,” and to the word, “operations,” used in the regulatory term, “equipment cleaning operations.”

As noted in Part VI.B above, for the category of “transportation facilities,” EPA separated out for storm water regulation those facilities it considered to be engaging in “industrial activity.” Such facilities must have one or more specified SIC codes, and must have “vehicle maintenance shops, equipment cleaning operations, or airport deicing operations.” 40 C.F.R. § 122.26(b)(14)(viii). As used in section 122.26(b)(14)(viii), the words, “shop” and “operations,” are nouns preceded by the compound adjectives, “vehicle maintenance” and “equipment cleaning,” respectively. Each complete term must be read as a whole to give full meaning to the words selected by EPA in implementing the statute. *See, e.g., In re Deseret Power Elec. Coop.*, PSD Appeal No. 07-03, slip op. at 29 n.25 (EAB Nov. 13, 2008), 14 E.A.D. \_\_\_; *In re Cardinal FG Co.*, 12 E.A.D. 153, 173-74 (EAB 2005); *In re Mayes*, 12 E.A.D. 54, 91 (EAB 2005), *aff’d*, No. 3:05-CV-478, 2008 WL 65178 (E.D. Tenn. Jan. 4, 2008).

2. *The ALJ Erred in Interpreting “Vehicle Maintenance Shop”*

a. *The Plain Meaning of “Shop” Is Illustrative, But Does Not Provide Clear Guidance for the Purpose of Interpreting the Full Regulatory Term*

Given that the storm water regulations do not define the term, “vehicle maintenance shop,” the ALJ appropriately commenced her analysis with an attempt to determine whether that phrase has a plain meaning. The Initial Decision states that:

Given the inclusion of [the word “shop”], it is impossible to ignore that the regulation clearly contemplates that vehicle maintenance activities occur in the context of a “shop.” Indeed, it is the inclusion of the noun “shops” [sic] that narrows the scope of the regulatory language. Absent the word “shops” the phrase “vehicle maintenance” would have a significantly broader reach.

Init. Dec. at 20. The Board agrees with this observation.

To determine the meaning of the word “shop,” the ALJ turned to the dictionary:

The noun “shops” is defined in its singular form as “a building or room stocked with merchandise for sale” or, in the context of repairs, “a commercial establishment for the making of repairing of goods or machinery.”

*Id.* (quoting *Webster’s Third New International Dictionary* 2101 (2002)). The ALJ further noted that “[c]ommon synonyms of the word ‘shop’ include a workshop, studio, atelier, factory, plant, works, or mill.” *Id.*

at 20 n.13 (citing *The Random House Thesaurus College Edition* 645 (1987)).

Additional dictionary definitions of the word “shop” indicate that it can have a broader meaning than the structure-oriented meaning suggested by the definitions chosen by the ALJ. For example, alternative definitions include the following phrases: “a center of operations”; “functional activity”; “a business establishment: place of employment”; and “a gathering place: center of activity.” *Webster’s Third New International Dictionary* 2101 (1993) [hereinafter *Webster’s*]. None of these dictionary definitions of “shop,” however, provides a sufficiently clear and singular meaning of the term to enable the Board to determine conclusively what constitutes a “vehicle maintenance shop” within the meaning of the storm water regulations. Therefore, the Board must turn to the regulations as a whole, the regulatory history (including guidance provided in the preamble to the regulations), and subsequently issued Agency interpretations to make that determination.

- b. *“Vehicle Maintenance Shop” Refers to a Nontransient Area or Location That Is Designated for Use for Vehicle Maintenance or in Which Vehicle Maintenance Is Conducted on a Regular or Repeated Basis, Including Intermittently or Sporadically*

Taken together, the regulations, regulatory history, and long-standing Agency guidance indicate that the term “vehicle maintenance shop” should be construed as referring to a nontransient location or area at a transportation facility’s site that is designated for use for vehicle maintenance or in which vehicle maintenance is conducted on a regular or repeated basis, including intermittently or sporadically. As discussed above, the examples provided in the preamble to the final rule and in the Agency’s guidance documents on this rule demonstrate that the Agency was concerned with regulating areas on which contaminants may be deposited and *may* accumulate over time, thereby posing a risk that storm water flowing across those areas will carry the contaminants from the facility into the waters of the United States. *See, e.g.*, Q&A Vol. 1 ¶ 32,

at 12 (“[o]nly nontransient vehicle maintenance shops are included in the transportation category”).

The physical size and other physical characteristics of the area (e.g., covered versus open to the elements) appear to be irrelevant, as the Agency included responses to comments in several contexts explaining that storm water permits are required regardless of these factors. *See, e.g.*, 55 Fed. Reg. at 48,009 (covered and uncovered maintenance facilities alike are regulated); *id.* at 48,009-10 (storage areas of any size, whether covered or uncovered, are associated with industrial activity); *id.* at 48,012-13 (all landfills that receive industrial waste are regulated, regardless of size, as the size of the facility “will not dictate what type of waste is exposed to the elements”). The fact that certain maintenance activities might be “minor” rather than “major” in scope also is irrelevant, as the Agency indicated that storm water permits are required if any repairs, even minor ones, occur in the designated areas. *See id.* at 48,013 (even “minor repairs” to railroad cars on tracks set aside for such repairs trigger the NPDES permitting requirements, because the volume of trains (i.e., heavy industrial equipment) being repaired in such train yards “connote industrial activity”).

The examples cited in the preamble to the regulations and the Agency’s guidance reflect the Agency’s concern that regular or repeated use of an area for vehicle maintenance raises the possibility that the site could become a “repositor[y] for pollutants such as oil and grease from machinery or vehicles,” and thus that pollutants might “accumulate” there over time, posing a storm water-related risk to the environment. *See id.* at 48,009. Railroad cars, for instance, are set aside for minor repairs in track “yards,” where they are “concentrated,” and where they are “diesel fueled, lubricated, and repaired in volumes that connote industrial activity, rather than retail or commercial activity.” *Id.* at 48,013. Marinas “rent boat slips, store boats, and generally perform a range of other marine services including boat cleaning and incidental

boat repair.”<sup>9</sup> Q&A Vol. 1 ¶ 37, at 13. If (and only if) they are “involved in vehicle (boat) maintenance activities (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication) or equipment cleaning operations, those portions of the facility” so involved “are considered to be associated with industrial activity” and must be permitted. *Id.* Airlines send numerous airplanes to passenger and cargo terminals, to carry planeloads of people and cargo, and thus the aprons adjacent to the terminals, upon which minor airplane maintenance may be conducted, are in frequent if not continuous use. *See* 1995 Report to Congress app. E, at E-43. Finally, the “nonretail fueling operation” of a transportation facility (SIC codes 40 through 45) at which “no other maintenance activities” take place suggests repeated refueling of the trucks, cars, boats, railroad engines, airplanes, and other instrumentalities of transportation specifically used within these SIC categories to achieve the business purposes of the facilities. *See* Q&A Vol. 1 ¶ 35, at 12; *see, e.g.*, Q&A Vol. 2 ¶¶ 24-25, at 9 (fueling of tanker trucks used to transport petroleum products to/from petroleum bulk storage facility is “routine vehicle maintenance” that is “associated with industrial activity”).

Read in context, and with legislative intent in mind, these examples contemplate the existence of repeated or regular vehicle maintenance activity at a nontransient area or location at a facility, even if minor, and even if intermittent or sporadic. That this is so is conceded by the Region itself, which responded to a Board question about pollutant accumulation by claiming, “it is the on-site location that is relevant, because that indicates *repeated or regular activity*, not only or

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<sup>9</sup> This example arose in response to a question whether a marina must apply for an NPDES permit if it operates a retail fueling operation but no vehicle maintenance or equipment cleaning activities are conducted onsite. The Agency responded, “The retail sale of fuel alone at marinas, without any other vehicle maintenance or equipment cleaning operations, is not considered to be grounds for coverage under the storm water regulations.” Q&A Vol. 1 ¶ 37, at 13.

always pollutant accumulation.”<sup>10</sup> R9 Suppl. Br. at 17. In sum, to establish the existence of a vehicle maintenance shop on a transportation facility, the Agency has to prove by a preponderance of the evidence that there is a nontransient area or location that is designated for vehicle maintenance or where vehicle maintenance is conducted on a regular or repeated basis, including intermittently or sporadically.

c. *The ALJ’s Interpretation Is Unduly Narrow and Inconsistent with the Purpose of the Statute and Regulations*

In her Initial Decision, the ALJ found that in order to establish the presence of a “vehicle maintenance shop,” the Region must: demonstrate the presence of a “*discrete structure used for the purpose of vehicle maintenance*”; or demonstrate that San Pedro “was engaged in an *industrial establishment for the purpose of maintaining or repairing vehicles*”; or show “the presence of a *sufficient volume, level, and concentration of outdoor repair activity*”; or provide evidence that San Pedro “maintain[ed] a vehicle fleet or engage[d] in the type of *daily maintenance activities* that would customarily require the presence of a dedicated maintenance shop.” Init. Dec. at 30, 31 n.19 (emphases added). The Board finds that this interpretation is unduly narrow and inconsistent with the purpose and intent of the statute and the storm water regulations. Moreover, it fails to provide a clear standard for determining when a storm water permit is required at a transportation facility.

The presence of a “discrete structure used for the purpose of vehicle maintenance” certainly would be a strong indicator establishing the regulatory element of a “vehicle maintenance shop.” However, the absence of a structure is not conclusive as to the question of whether a respondent has a vehicle maintenance shop requiring a permit. As described above, the preamble to the regulations explained that maintenance facilities “frequently will have outside areas where parts are

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<sup>10</sup> The Board agrees that pollutant accumulation is not necessary, but it can be an indicia of the existence of a vehicle maintenance shop.

stored and disposed of,” and “[s]uch areas are locations where oil, grease, solvents[,] and other materials associated with maintenance activities will accumulate,” and thus are “associated with industrial activity.” 55 Fed. Reg. at 48,009. The regulatory history also establishes that uncovered vehicle maintenance shops, not just “discrete structure[s],” also are subject to regulation.

The ALJ’s suggested alternate test of whether San Pedro “was engaged in an industrial establishment for the *purpose* of maintaining or repairing vehicles” is also too narrow, to the extent that it suggests that the Region was required to establish that the entire or main purpose of San Pedro’s facility was the maintenance or repair of vehicles. The language of the regulation makes plain that the permit requirement applies to a facility whose main purpose is “transportation” (as is the case here),<sup>11</sup> if some part of that facility is used for a vehicle maintenance shop, equipment cleaning operations, or airport deicing operations.

The Board agrees with the ALJ’s third suggestion that “conceivabl[y], \* \* \* the requirement for a maintenance ‘shop’ could be met by the presence of a sufficient volume, level, and concentration of outdoor repair activity,” but this simply is an example of what *could* demonstrate the presence of a vehicle maintenance shop; it does not define what this regulatory term means generally. Moreover, the ALJ does not specify or even attempt to describe what “level, volume, and concentration” of maintenance activity would be “sufficient” to establish the presence of a “shop.” Lastly, the ALJ’s inference that the Region needed to demonstrate that San Pedro “maintain[ed] a vehicle fleet” or engaged in “daily maintenance activities that would customarily require the presence of a dedicated maintenance shop” is not supported by the plain language of the regulations or the regulatory history, and is too narrow in scope.

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<sup>11</sup> Specifically, the transportation activity involved in this case is the “transloading of freight.” *See supra* Part V.

- d. *The Board Rejects the Region's Interpretation That Evidence of Any On-Site Vehicle Maintenance Activities Can Establish the Required Element of "Vehicle Maintenance Shop"*

The Region argues on appeal that “the term ‘vehicle maintenance shop’ refers to the on-site location where vehicle maintenance activities take place.” R9 Appeal Br. at 2.<sup>12</sup> The Board finds this argument overbroad and inconsistent with the language of the regulatory provision that requires a storm water permit only for “transportation facilities [within certain SIC codes that] have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations.” As the ALJ correctly pointed out, the Region’s interpretation, taken literally, could read the word “shop” out of the regulations, and could mean that any single instance of vehicle maintenance activity occurring anywhere on the facility would trigger the storm water permit requirement. The regulation’s inclusion of the word “shop” strongly indicates that more is required.<sup>13</sup> In at least one instance, the Region appeared to recognize this point, when it responded to the Board’s question about the applicability to this case of the statement in EPA’s 1992 guidance document that “[o]nly nontransient

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<sup>12</sup> See also R9 Appeal Br. at 15 (“the existence of on-site vehicle maintenance activities at [covered] transportation facilities \* \* \* is enough to trigger permit coverage”); *id.* at 23 (“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”); *id.* at 26 (“[a shop] is simply a location where vehicle maintenance occurs”); R9 Suppl. Br. at 13 (“[w]hether the facility has a vehicle maintenance shop \* \* \* is simply established through the presence of on-site vehicle maintenance”); Tr. at 502-03 (testimony of Ms. Miller, the Region’s inspector, that “it does not matter” where on the facility evidence of vehicle maintenance is observed, in terms of determining whether a facility is required to obtain a storm water permit).

<sup>13</sup> Further, as discussed in Part VI.A above, the legislative history for the statutory provision indicates that Congress intended to require permit coverage only for the areas on an industrial facility that are directly related to industrial activity and not to include other areas, such as parking lots on which occasional acts of vehicle maintenance may take place. As explained above, the Agency specifically endorsed and adopted this legislative history when it issued the regulations.

vehicle maintenance shops are included in the transportation category.” Q&A Vol. 1 ¶ 32, at 12. Although the Region incorrectly believed that this example was not applicable to the facts of this case, it replied:

While not explicit in Q&A Volume 1, it is unlikely that repairs along a railroad system would repeatedly occur at the same location. 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. Thus, *it is unlikely that such random locations would be “repositories” for pollutants, and are [sic] therefore do not trigger permit application requirements.*

R9 Suppl. Br. at 12 (emphasis added) (footnote moved to text and internal citations omitted).

3. *The ALJ Erred in Interpreting “Equipment Cleaning Operations”*

a. *The ALJ’s Interpretation Is Unduly Narrow and Inconsistent with the Purpose of the Statute and Regulations*

As noted earlier, the storm water regulations also do not define the term, “equipment cleaning operations”; thus, the ALJ again appropriately commenced her analysis with an attempt to determine whether that phrase has a plain meaning. The Initial Decision states that the verb “clean” is defined as:

“[T]o make clean or free of dirt or any foreign or offensive matter[:] as \* \* \*

to wash with water and soap or with any aqueous liquid medium \* \* \* to bathe, brush, or treat with an acid, alkaline, or organic agent, rub with an oil or cream, or sponge or swab with a disinfectant for removing undesired matter.”

Init. Dec. at 31 (quoting *Webster's* at 419). The Initial Decision also relied on the following definition of the noun “operation”: “a business transaction [especially] when speculative \* \* \* the whole process of planning for and operating a business or other organized unit \* \* \* a phase of a business or of business activity.” *Id.* at 31-32 (quoting *Webster's* at 1581). The Board agrees that these plain language definitions are helpful to understanding the meaning of the regulatory term, “equipment cleaning operations.” One other definition pertinent to understanding the meaning of this regulatory term is the one for “equipment,” which in ordinary usage means “the implements (as machinery or tools) used in an operation or activity.” *Webster's* at 768. While these definitions are helpful, they do not convey the full intent of what areas and activities the Agency intended to regulate as equipment cleaning operations. For that, the Board again turns to the storm water regulations as a whole, the regulatory history (including guidance provided in the preamble to the regulations), and subsequently issued Agency interpretations to make that determination.

b. *The Term, “Equipment Cleaning Operations,” Refers to Cleaning of Industrial Equipment Anywhere on a Facility’s Site Pursuant to a Business Process or Practice*

Taken together, the regulations, regulatory history, and Agency guidance indicate that the term, “equipment cleaning operations,” should be construed as referring to those areas on a transportation facility’s site, whether nontransient or transient, in which equipment cleaning of any type, quantity, significance, or frequency is conducted pursuant to a business’ operations or practice. Establishing the presence of equipment

cleaning operations can be express (e.g., a written equipment maintenance plan that includes cleaning) or implied (e.g., regular or repeated washing of vehicles after use or as they become dusty). Similarly, questioning of facility employees or owners during an inspection as to what cleaning activities are performed, and introducing such evidence through testimony or affidavits also may establish the existence of equipment cleaning operations.<sup>14</sup>

As noted in Parts VI.B-C above, the regulations, regulatory history, and Agency guidance documents reveal a focus on an area on an industrial facility where equipment cleaning operations are conducted. For example, in the guidance documents, EPA states that “[o]nly the \* \* \* equipment cleaning areas (such as truck washing areas) must be addressed in the [NPDES permit] application.” Q&A Doc. Vol. 1 ¶ 22, at 9. “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.” 1995 Report to Congress app. E, at E-36, -38; *accord* Motor Freight Fact Sheet at 2. Moreover, “storage areas of materials used in \* \* \* equipment cleaning operations \* \* \* are also considered areas associated with industrial activity,” and thus must be permitted. Q&A Vol. 2, ¶ 23, at 9.

According to the Region, EPA focused on “areas” in describing “equipment cleaning operations” because it wanted to ensure that storm water controls are implemented for the locations where industrial activities of this particular kind take place. R9 Appeal Br. at 31. This view accords with the Agency’s guidance in another “operations” context – i.e., that of “airport deicing operations.” In its guidance document, EPA explains that for airport deicing operations, “[a]irports or airline companies must apply for a storm water discharge permit for *locations* where deicing chemicals are applied. This includes, but is not limited to, *runways, taxiways, ramps, and areas used for the deicing of airplanes.*” Q&A Vol. 1 ¶ 29, at 11 (emphasis added). Plainly, deicing

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<sup>14</sup> There are many ways in which the Region could demonstrate the presence of equipment cleaning operations. The above-listed examples are illustrative only.

operations are integral phases of air transportation, at least for airports located in cold and snowy climates. In winter, the operations are repeated or occur regularly in certain areas (such as at an airline's deicing station) and irregularly in other areas (such as on a far turn of a runway, where an airplane waits its turn to take off). Some instances of deicing even may occur in a very transient fashion, such as once on a taxiway, for instance, and never or rarely again in that same exact spot. Given this, the airport deicing example may be understood as suggesting that even sporadic deicing of an aircraft pursuant to the airport's business operation or practice, wherever it occurs on an airport's widespread grounds, will trigger the permitting requirements of the storm water rule.

This interpretation of the term, "airport deicing operations," is different than that of the railroad example provided in the Agency's guidance, where the Agency stated that vehicle maintenance repairs along a railroad system (another widespread entity, mentioned in Part VI.C above) are *not* regulated as "vehicle maintenance," because "[o]nly *nontransient* vehicle maintenance shops are included in the transportation category." *Id.* ¶ 32, at 12. The difference between these two examples reflects the Agency's use of different compound adjectives ("vehicle maintenance," "equipment cleaning," and "airport deicing") and different operative nouns ("shop" and "operations") for the three regulatory terms in 40 C.F.R. § 122.26(b)(14)(viii). EPA chose the word, "operations," to serve as the object of the "airport deicing" and "equipment cleaning" activities it regulated as "industrial activity," and chose a different word, "shop," as the object of the "vehicle maintenance" activities it regulated as "industrial activity." These word choices are not accidental, and the Board construes the storm water regulations in a way that honors their differences. For these reasons, the Board finds the Agency's guidance related to airport deicing *operations* to be more instructive as to the meaning it should give "equipment cleaning *operations*" than guidance related to "vehicle maintenance *shop*."

Considering the common understanding of both "operations" and "shop," combined with more general principles in the regulatory record, leads the Board to conclude that the term "equipment cleaning

operations,” should be construed in a manner similar to the term, “airport deicing operations.” That is, the storm water regulation’s permitting requirements apply to a facility that has equipment cleaning operations on the site, even if the particular incidences are sporadic and/or not ever repeated in precisely the same place. The areas where equipment cleaning operations occur may include, or be adjacent to, storage areas for cleaning supplies and equipment, or they may have other indicia of cleaning activity in the vicinity, such as sinks, hoses, sloped surfaces or curbs to direct or contain wash water, solvent containers, detergents, eye wash kits, or concentrated areas of contaminants that have been washed off.<sup>15</sup> One key difference between “vehicle maintenance shop” and “equipment cleaning operations” is that to be subject to the storm water regulations, the vehicle maintenance must occur in a *nontransient* area or location designated for vehicle maintenance or where vehicle maintenance is conducted on a regular or repeated basis, whereas equipment cleaning can occur at any *nontransient or transient* location on the site once it has been demonstrated that the facility has established equipment cleaning operations.

In sum, to establish the existence of “equipment cleaning operations,” the Agency has to prove by a preponderance of the evidence that a respondent has established a business process or practice for equipment cleaning and has conducted cleaning of equipment pursuant to that process or practice.

*c. The ALJ’s Interpretation Is Unduly Narrow and Inconsistent with the Purpose of the Statute and Regulations*

In her Initial Decision, the ALJ found that in order to establish the presence of “equipment cleaning operations,” the Region must demonstrate the existence of “a systematic process or ‘operation’ that has a distinct commercial or organizational, though not necessarily profit-relevant, purpose for the regulated entity.” Init. Dec. at 37. She held that such a “systematic process or ‘operation’” must consist of something

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<sup>15</sup> Again, this list is for illustrative purposes only.

more than “periodically wiping dirt off the surface of a trailer” or “occasionally hosing off the exterior of a forklift,” because the industrial storm water rules “contemplate regulation of sustained or organized operations, not one-off or incidental events.” *Id.* While the Board agrees with some aspects of the ALJ’s interpretation (e.g., one-off or incidental cleaning alone does not demonstrate that a permit is needed), the Board finds the ALJ’s overall interpretation to be unduly narrow and inconsistent with the purpose and intent of the statute and the storm water regulations. For example, the ALJ held that washing of a singular forklift was similar to individual car washing, which is exempt from the storm water regulations, and thus, the individual forklift washing also was exempt. *See Id.* at 37-38. As stated above, once the Region has established there is a business process or practice related to equipment cleaning, any incident of cleaning pursuant to that process or practice would be subject to the permitting requirements of the storm water regulations.

d. *The Board Rejects the Region’s Interpretation That Evidence of Any On-Site Equipment Cleaning Alone Can Establish the Required Element of “Equipment Cleaning Operations”*

The Region argues on appeal that equipment cleaning itself is the focus of the Agency’s concern, not its systematic or organizational aspects. R9 Appeal Br. at 29. It also argues that “transportation facilities [that] engage in equipment cleaning, regardless of volume, are subject to the definition.” *Id.* at 33. While the Board agrees that volume of cleaning is not a criterion, as stated previously, to find jurisdiction under this element of the storm water regulations, the Region needs to establish *both* the presence of a business process or practice related to equipment cleaning at the site, *and* cleaning of equipment pursuant to that process or practice.

B. *The Evidence Establishes That San Pedro Is a Regulated Entity Under 40 C.F.R. § 122.26(b)(14)(viii) and Is Liable for Violating the CWA*

At this juncture, the Board has the authority to remand the case to the ALJ for a reevaluation of CWA liability and assessment of penalty, as appropriate. 40 C.F.R. § 22.30(c). The Board has opted not to remand this case, however, for several reasons, including the recent retirement from federal service of the presiding ALJ in this case, the voluminous record related to the facts underlying Counts 1 and 3 of the complaint with which a new ALJ would have to become familiar resulting in more time before a final decision is reached, and the need to bring the case to resolution as expeditiously as possible. Accordingly, the Board now turns to the questions of liability and appropriate penalty.

1. *The Region Has the Burden of Establishing Liability*

Under the Consolidated Rules of Practice that govern this proceeding, the complainant has the burden of presenting a prima facie case of violation, and the respondent has the burden of presenting evidence to rebut the prima facie case. 40 C.F.R. § 22.24(a). The complainant has the ultimate burden of persuasion that the violations occurred as alleged in the complaint. *Id.*; *In re City of Salisbury*, 10 E.A.D. 263, 277-78, 289 (EAB 2002); *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 536-37 n.16, 542-43 (EAB 1994). Each matter in controversy must be decided upon a preponderance of the evidence. 40 C.F.R. § 22.24(b).

In the present case, the elements that must be pled to establish a prima facie case of violation of CWA sections 301(a) and 402(p) and 40 C.F.R. § 122.26(b)(14)(viii) include allegations that San Pedro is a “transportation facility” with: (a) one (or more) of SIC Codes 40xx through 45xx (except 4221-4225); (b) a “vehicle maintenance shop” and/or “equipment cleaning operations”; and (3) discharges of pollutants from a point source to waters of the United States during the alleged period of violation (i.e., October 1, 2004, to December 24, 2007). A prima facie case is deemed made where the complainant presents

evidence of sufficient quality and quantity on each of the requisite elements that, if not rebutted, the trier of fact would “infer the fact at issue and rule in [the complainant’s] favor.” Black’s Law Dictionary 1805 (9th ed. 2009) (defining “prima facie case”); *see Salisbury*, 10 E.A.D. at 283-89 (discussing elements of prima facie case establishing bulk sewage sludge application violation); *New Waterbury*, 5 E.A.D. at 538-43 (discussing elements of prima facie case establishing appropriateness of proposed penalty under Toxic Substances Control Act). A “preponderance of the evidence” standard is deemed achieved by establishing a fact as “more likely than not.” *In re Bricks, Inc.*, 11 E.A.D. 224, 226 (EAB 2003), *aff’d*, 426 F.3d 918 (7th Cir. 2007); *In re Richner*, 10 E.A.D. 617, 620 (EAB 2002); *see also In re City of Marshall*, 10 E.A.D. 173, 180 (EAB 2001) (“preponderance of the evidence” means “the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other”) (quoting Black’s Law Dictionary 1201 (7th ed. 1999)).

In the proceedings before the ALJ, San Pedro classified itself under SIC Code 4213, “Trucking, Except Local.” This SIC code falls within the regulated range for transportation facilities and San Pedro’s designation as such is not disputed on appeal. The Board therefore will accept it as an established fact<sup>16</sup> and turn next to the question whether the

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<sup>16</sup> In the preamble to the 1990 storm water rules, EPA stated, “Industries will need to assess for themselves whether they are covered by a listed SIC and submit an application accordingly.” 55 Fed. Reg. at 48,010. Given that San Pedro self-designated this SIC code, and based on the Board’s conclusion below that the company had equipment cleaning operations, the Board does not agree that San Pedro is not subject to the NPDES permitting requirements as it contends. *See San Pedro Resp. Br.* at 2-4. (The Board further notes that in a January 2008 letter to the Region, San Pedro stated that “[t]he primary business of San Pedro Forklift was and continues to be the transfer of fresh produce, frozen vegetables, alfalfa hay, and various dry goods from over-the-road trailers into ocean containers for export and import,” CX 33, at 1, providing further evidence that the company is within a covered transportation SIC code.) The fact that the California Regional Water Quality Control Board may have approved San Pedro’s Notice of Termination indicating San Pedro no longer intended to be covered by the terms of the  
(continued...)

Region proved, by a preponderance of the evidence, that San Pedro had a “vehicle maintenance shop” or “equipment cleaning operations” during the alleged period of violation.

a. *The Region Did Not Establish by a Preponderance of the Evidence That San Pedro Had a “Vehicle Maintenance Shop” on Its Premises*

In the complaint, the Region made no specific allegations about San Pedro having a “vehicle maintenance shop” on its premises.<sup>17</sup> Instead, the Region alleged that during EPA’s two inspections of San Pedro’s facility, the inspectors “observed sources of pollutants (oil and batteries, 55-gallon drums, obsolete equipment stored outdoors with no cover or containment) exposed to storm water, poor housekeeping (trash in the yard) and large pavement stains, indicating prior spills that were not properly addressed.” Compl. ¶¶ 23, 51, at 5, 10. To support these allegations, the Region introduced testimony, affidavits, photographs, and other materials at the evidentiary hearing.

The Region also introduced San Pedro’s SWPPP, which states that San Pedro stored diesel fuel, engine oil, hydraulic fluid, transmission fluid, coolant, bromide, and propane on site and that these materials were “necessary” for San Pedro’s daily operations. SWPPP at 8 (“Significant Materials List”). The SWPPP also identified the forklifts, yard goats, truck, and other machinery and equipment necessary for San Pedro’s

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<sup>16</sup>(...continued)

general permit is not determinative, because in part, entities subject to the storm water regulations have a choice to be under the terms of the general NPDES permit or an individual NPDES permit. *See supra* note 8.

<sup>17</sup> Though the complaint did not allege the existence of a “vehicle maintenance shop,” the parties litigated the matter at the hearing. *See, e.g.*, Tr. at 140-41, 242, 245, 348-52, 409-26, 441-56, 460-62, 502-03; *see also* San Pedro Resp. Br. at 21 (arguing that “it appears that the allegation that [San Pedro] had a vehicle maintenance shop was concocted by [the Region] after the conclusion of the administrative hearing and raised for the first time in [the Region’s post-hearing brief] as an afterthought”). The Region did not file a motion to amend the complaint to conform to the evidence presented at the hearing, but the ALJ implicitly treated the complaint as so amended.

operations as “Operational Equipment.” *Id.* at 7. In a list of “Existing Non-Structural Best Management Practices,” the SWPPP reported that “[a]ll Operational Equipment is well maintained by an outside company,” and that “Operational Equipment is inspected on a regular basis for fluid leaks or drips and repaired immediately if necessary.” *Id.* at 18.

Other relevant evidence introduced at the hearing included testimony by San Pedro’s technical consultants that indicated that “[b]asically, there is occasional topping off of hydraulic fluid and occasionally washing, you know, hosing off the dust,” Tr. at 1611, and that a third-party company periodically came on-site to conduct minor forklift maintenance, such as changing or topping off hydraulic oil, engine oil, and fuel, and then removed the used fluids from the site. Tr. at 1427-31. Mr. Balov testified that the forklifts were fueled on-site with propane gas.<sup>18</sup> Tr. at 2181-82.

Importantly, the Region did not present evidence as to the existence of a shop – i.e., a nontransient area or location at San Pedro’s site of any size, whether covered by a roof, surrounded by walls, or open to the elements, designated for vehicle maintenance or in which vehicle maintenance of any type, quantity, significance, or frequency is (or was) conducted. Presumably, this is because the Region’s inspector did not believe she needed to do so. At the hearing, San Pedro’s attorneys asked Ms. Miller whether she observed a “vehicle maintenance facility” on the premises, and she responded by repeatedly stating that she saw evidence that vehicles were being maintained at the facility. *E.g.*, Tr. at 242, 351. San Pedro’s attorneys then repeatedly asked Ms. Miller to identify the locations on the site where she found the various purported indicia of maintenance activity. *E.g.*, Tr. at 348-52, 409-26, 441-56, 460-62. She ultimately explained, on redirect, that “it does not matter” where on the

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<sup>18</sup> San Pedro contradicts Mr. Balov’s statement in its response to the Region’s appeal brief, claiming that it “uses *electrically powered forklifts* to accomplish its transloading work, which are maintained by an outside contractor.” San Pedro Resp. Br. at 21 (emphasis added). This argument should have been raised before the ALJ at the hearing, not for the first time in a brief to the Board; however, given that the Board finds the Region did not establish the presence of a “shop,” the contention is moot.

facility evidence of vehicle maintenance is observed, in terms of determining whether a facility is required to obtain a storm water permit. *See* Tr. at 502-03. The Region appears to sanction this view, as even on appeal it resists identifying a specific “shop site,” instead essentially claiming that the entire facility constituted the shop site. *See, e.g.*, R9 Appeal Br. at 26; R9 Suppl. Br. at 13 (asserting that “this facility has a non-transient maintenance shop,” but failing to identify the location of that “shop”), 16 (“[w]hether the facility has a vehicle maintenance shop \* \* \* is simply established through the presence of on-site vehicle maintenance”). Additionally, Ms. Miller admitted that she did not know whether the forklifts were maintained on site, nor did she know from which vehicle or equipment the battery she observed on a pallet had been taken. Tr. at 244-45, 254-55. The Region also did not offer any direct evidence regarding when or how the various materials purportedly observed at the site (e.g., hydraulic fluid, diesel fuel, engine oil, and/or transmission fluid) were used – i.e., there was no direct evidence such fluids were used in *vehicles* versus *equipment*. *See* Init. Dec. at 23. As only *vehicle* maintenance shops are regulated under this prong of the regulations, this information is important.

The ALJ assessed all of the evidence presented in this case and held that it “supported the conclusion that [San Pedro] was conducting occasional activities that might properly be termed maintenance of vehicles and equipment. Nevertheless, the overall evidence adduced at hearing does not meet the definition of ‘vehicle maintenance shop.’” Init. Dec. at 29. Although the record established that maintenance was occurring at the San Pedro facility, the Region failed to meet its burden of identifying a nontransient area or location where maintenance activities were conducted, other than to point to the entire facility as the maintenance site. A preponderance of the evidence, however, shows that at least some of the facility was not, in fact, used for vehicle maintenance of any kind. Instead, it was used to transload goods, to stage goods for transloading, and to fumigate agricultural products. San Pedro rebutted many of the elements of the Region’s site-wide case, for instance explaining that the metal poles and tires Ms. Miller observed were used for the fumigation operations and thus were not discards from vehicle maintenance; that the pavement stains scattered over the property were

caused by fluid leaks from trucks temporarily parked in various places and thus were not spills from vehicle maintenance; and that the single battery Ms. Miller saw could have come from an employee's car rather than industrial maintenance activities. *See, e.g.*, Tr. at 254-55, 329, 350-52, 432-34, 440, 1194-95, 1926-37, 1971-72, 2007, 2139.

The Board therefore affirms the ALJ's finding that the Region failed to prove by a preponderance of the evidence that San Pedro had a "vehicle maintenance shop" on its premises during the alleged period of violation. In so holding, the Board is not concluding that there was or was not a vehicle maintenance shop at the San Pedro facility, but only that the Region failed to establish the existence of one. For example, the location where the blue barrels and small containers were clustered together could have been a candidate for further investigation as a "vehicle maintenance shop," but the Region presented no definitive evidence, such as what substances actually were present in those containers, what the substances actually were used for, or what "vehicle" or "vehicles" actually were the subject of maintenance using the substances (if any). As a result, the Board has no basis to make a judgment as to whether any "vehicle maintenance" actually took place in the area immediately surrounding the blue barrels and small containers or whether the area was a place San Pedro designated and/or used as a "shop" for its maintenance activities. And even though the SWPPP states that maintenance occurs at the San Pedro facility, it does not identify a nontransient area or location where such activities are conducted. The Region's evidence, taken as a whole, is only suggestive, not probative. It does not assist the Board in determining what "portions of the facility," if any, were "associated with industrial activity" and thus should have been covered under an NPDES storm water permit. *See* 40 C.F.R. § 122.26(b)(14)(viii).

Importantly, although the Board is affirming the ALJ's finding with respect to vehicle maintenance shop, the Board is not affirming all of the bases underlying the ALJ's decision. Specifically, to the extent

her findings are inconsistent with the Board's analysis in Part VII.A.2 above, they are overruled.<sup>19</sup>

b. *The Region Did Establish by a Preponderance of the Evidence That San Pedro Had "Equipment Cleaning Operations" on Its Premises*

In the case of "equipment cleaning operations," the outcome is different. The complaint again lacks specific allegations that San Pedro had such operations on its premises. At the hearing, however, the Region introduced San Pedro's SWPPP into evidence, which was signed and attested as "true, accurate, and complete" by Mr. Renato Balov, the company's principal. SWPPP at 3. The SWPPP states that "Operational *Equipment* refers to our *forklifts*, yard goats \* \* \*, truck, and other machinery and equipment necessary for operation." *Id.* at 7 (emphasis added). The record also establishes that San Pedro used its forklifts to convey goods and materials around the facility, Tr. at 93, 131, 1424, and thus the forklifts can be considered a form of "transfer equipment," as those words are generally understood. *See Webster's* at 2426-27 ("transfer" means "to carry or take from one person or place to another").

The SWPPP also includes the following as "Existing Nonstructural [Best Management Practices]": "The outside surfaces of

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<sup>19</sup> For example, the ALJ opined that "[e]ven occasional fueling or engine fluid topping off does not constitute a 'vehicle maintenance shop.'" Init. Dec. at 24 n.17. As discussed in Part VII.A above, the Board agrees that a random maintenance act occurring *outside* the boundaries of a designated maintenance area does not transmute that area into a regulated "shop." The "shop" must exist as a nontransient area or location at the facility site designated for vehicle maintenance or in which vehicle maintenance occurs; a sole act of fueling or fluid topping does not conjure up a "shop" in the location where the singular action occurs. Nonetheless, once the existence of a nontransient vehicle maintenance area is established, any act of maintenance within that area, such as fueling or fluid topping-off, would be subject to regulation under § 122.26(b)(14)(viii). Similarly, the ALJ's instructions that to demonstrate a vehicle maintenance shop, the Region would need to establish a certain "volume" of maintenance activity or "daily maintenance activities that would customarily require the presence of a dedicated maintenance shop," Init. Dec. at 30-31 & n.19, are inconsistent with the Board's interpretation of the regulations.

the machinery *and equipment are cleaned regularly* in order to minimize or eliminate any contact between operational fluids and storm water.” SWPPP at 18 (emphasis added). Mr. Bulot also testified that San Pedro’s owners said they “occasionally” hosed dust off the forklifts, Tr. at 1611, and Mr. Severini testified that San Pedro’s owners told him the site operations “have been, essentially, unchanged for a decade” Tr. at 1433; *see supra* Part V. As the SWPPP was submitted in 2008, the Board finds this to be probative evidence of equipment cleaning operations that likely were conducted during the period of violation cited in the complaint (2004-2007). Further, the record contains Ms. Miller’s eye-witness testimony that when she arrived for the May 2007 inspection, she saw a man hosing off a forklift parked on the loading dock, using what appeared to be a garden hose to rinse the forklift’s exterior. Tr. at 118-19, 131-32, 231-33, 236-37, 2222-23, 2236-38, 2241-42. She later saw men using brooms to push the washwater off both sides of the loading dock. Tr. at 119, 132, 2229, 2236; *see* CX 14, photo 8. The ALJ found Ms. Miller’s testimony to be credible on this point, despite numerous and sustained efforts by San Pedro’s attorneys to undermine it. Init. Dec. at 37; *see, e.g.*, Tr. at 231-39, 462-64, 870-77, 1240-41, 1978-88, 2164-65, 2221-42.

“Cleaning” means to wash “with any aqueous liquid medium,” such as water. *Webster’s* at 419. In light of the evidence in the record, the Board finds that San Pedro’s forklifts are “equipment” within the meaning of section 122.26(b)(14)(viii), and finds the observed spraying of the forklift on the loading dock with water constitutes “cleaning” under the regulatory provision. *See* 1995 Report to Congress app. E, at E-38 (“equipment cleaning operations” take place in areas where “rinsing of transfer equipment” occurs); Motor Freight Fact Sheet at 2 (same).

The Board also finds that Ms. Miller’s credible testimony, coupled with the statements in the SWPPP and San Pedro’s expert testimonies, is probative evidence that equipment cleaning operations were continuing at San Pedro at the time of Ms. Miller’s May 2007 inspection, pursuant to the cleaning practices described in San Pedro’s SWPPP. The Board notes that this is particularly probative as the

forklift was openly washed in the presence of the Region's inspector.<sup>20</sup> *See In re City of Salisbury*, 10 E.A.D. 263, 276, 293-96 (EAB 2002) (Board defers to ALJ's reasoned analysis of witness credibility); *accord In re Euclid of Va., Inc.*, 13 E.A.D. 616, 673-75 (EAB), *appeal voluntarily dismissed*, No. 08-1088 (D.D.C. Oct. 21, 2008).

In sum, the weight of the evidence establishes that San Pedro regularly or occasionally cleaned its forklifts as a part of its equipment cleaning operations, including by hosing the forklifts off with water, and that San Pedro specifically cleaned one forklift pursuant to this practice on May 17, 2007. Under the Board's construction of the transportation facility regulations, set forth above, this evidence is sufficient to establish regulatory jurisdiction. *See supra* Part VII.A.3 (holding that once the Region has established the presence of equipment cleaning operations, any cleaning of relevant industry-related equipment pursuant

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<sup>20</sup> There was some dispute before the ALJ as to how much weight to give statements made by San Pedro in its SWPPP, which the company prepared following the Region's issuance of the first compliance order. *See* Init. Dec. at 33 & n.22. In her Initial Decision, the ALJ stated that "the reliability of the SWPPP is compromised by statements by [Mr. Balov] that [San Pedro] submitted the [notice of intent to be covered by a general permit] and prepared the SWPPP as a protective measure in response to a direct Administrative Order requiring compliance." *Id.* at 33 n.22 (citing Tr. at 2033-35, 2038). The ALJ further suggested that information in the SWPPP may not be that probative, as it "could be viewed as an effort by [San Pedro] simply to meet the requirements and come into compliance." *Id.* The Board does not agree that it is appropriate to allow a party to back away from statements it submits to a government agency (in this case, California) as part of a regulatory program. *See In re City of Salisbury*, 10 E.A.D. 263, 287-96 (EAB 2002) (rejecting City's attempt to qualify its official Discharge Monitoring Reports as "atypical" due to laboratory error, where City failed to prove actual existence of lab error). To do so undermines the environmental program that expressly requires the submission of a SWPPP to protect the waters of the United States. In this case, San Pedro submitted the SWPPP as it deemed it appropriate to do so from a business perspective. Later, when the Region filed a complaint against it, San Pedro attempted to disavow the statements it had made in the SWPPP. *See, e.g.*, Tr. at 2116-29. At minimum, the statements in the SWPPP, which Mr. Balov attested were "true, accurate, and complete," with his awareness "that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations[.]" SWPPP at 3, should have been viewed as statements against interest and considered probative evidence of equipment cleaning at the San Pedro facility. *See Salisbury*, 10 E.A.D. at 274, 293-96.

to that business operation or practice triggers the permitting requirements under the industrial storm water program). The ALJ erred in finding otherwise. Because the Board finds this element successfully established by a preponderance of the evidence, it turns next to an examination of the final elements of the Region's prima facie case of violation for Counts 1, 2, and 3.

2. *Count 1 Liability: Discharge of Pollutants into Waters of the United States*

To establish liability for Count 1, the Region must show, by a preponderance of the evidence, that within the alleged period of time San Pedro did not have an NPDES permit (i.e., October 1, 2004, to December 24, 2007), the company: (1) was a "person"; (2) that "discharged" storm water associated with industrial activity; (3) from a "point source"; (4) into "waters of the United States." CWA §§ 301(a), 402(p), 502(7), 502(12), 33 U.S.C. §§ 1311(a), 1342(p), 1362(7), 1362(12); 40 C.F.R. § 122.26(b)(14). The evidence in the record establishes that San Pedro Forklift was incorporated on November 24, 1987, and thus qualifies as a "person" under section 502(5) of the CWA, 33 U.S.C. § 1362(5). CX 1. The evidence also establishes that storm water running across San Pedro's facility was diverted through two storm drains into the City of Los Angeles's municipal separate storm sewer system ("LAMS4"), which discharged approximately 1,000 feet west of the drains into the Dominguez Channel Estuary. CX 11, at 1, 3; see CX 46 figs. 13-22, at 26-35 (unlined portion of Dominguez Channel below Vermont Avenue is an estuary). As a matter of law, both the storm drains and the LAMS4 outfall qualify as "point sources" within the meaning of CWA section 502(14), 33 U.S.C. § 1362(14). See 55 Fed. Reg. at 47,997 (categorizing discharges through MS4s as "point sources"); see also *United States v. Ortiz*, 427 F.3d 1278, 1281 (10th Cir. 2005) (holding that storm drains are point sources); *San Francisco Baykeeper v. West Bay Sanitary Dist.*, 791 F. Supp. 2d 719, 754 (N.D. Cal. 2011) (that MS4s are "point sources" is undisputed).

Further, the evidence in the record establishes that the Dominguez Channel Estuary is subject to the ebb and flow of the tide, as

the Channel itself is a tributary to the Los Angeles Harbor, San Pedro Bay, and ultimately the Pacific Ocean. *See* Tr. at 729-34, 775; California Regional Water Quality Control Board, *Water Quality Control Plan, Los Angeles Region* figs. 2-7, 2-8, 2-10, 2-21, at 2-28, 2-29, 2-31, 2-42 (June 13, 1994) (CX 53) (maps); Los Angeles Regional Water Quality Control Board, 2006 CWA Section 303(d) List 14 (June 28, 2007) (Suppl. CX 16). As such, the Dominguez Channel Estuary is a water of the United States. *See* 40 C.F.R. § 122.2 (“waters of the United States” include “all waters \* \* \* subject to the ebb and flow of the tide,” as well as tributaries to waters used in interstate or foreign commerce, such as the Los Angeles Harbor).

Turning to the remaining question of whether San Pedro discharged storm water associated with industrial activity without a permit, the Region introduced an urban hydrology expert, Mr. Craig Blett, who analyzed San Pedro’s facility using EPA’s Storm Water Management Model. Tr. at 535-45. That model uses site topography, precipitation rates, flow path dynamics, and other variables to identify the volume of storm water runoff from paved areas into storm sewers. *See* PG Environmental, LLC, *San Pedro Forklift Storm Water Analysis* (May 25, 2010) (CX 11) [hereinafter *Storm Water Analysis*]. The model showed that storms with rainfall in excess of 0.2 inches in a twenty-four-hour period would generate enough runoff to cause San Pedro to discharge storm water through the storm drains. *Id.* at 3; Tr. at 539, 541. It also showed that such storm events occurred forty-nine times during the alleged period of violation, September 29, 2004, to December 24, 2007. *Storm Water Analysis* at 3. San Pedro’s experts disagreed with Mr. Blett’s assessment of the size of the storm needed to generate a discharge, but they failed to offer any data or calculations to support their statements. *See, e.g.*, Tr. at 1463, 1570-71. The weight of the evidence therefore establishes that there were forty-nine *potential* days of violation during the period the Region alleges in its complaint; however, the record does not establish when equipment cleaning commenced at the site during this period of time.

Specifically, while San Pedro’s SWPPP and expert testimony provide probative evidence that its business process or practice involved

cleaning its equipment “regularly” and it “occasionally” hosed off its forklifts, and that such operations “have been, essentially, unchanged for a decade,” Tr. at 1433, there is no probative evidence in the record before the Board that such “regular” or “occasional” cleaning occurred on or before September 29, 2004 (the beginning of the alleged period of violation) and May 17, 2007 (the date Ms. Miller observed a forklift being hosed off). Without evidence of when equipment cleaning commenced pursuant to San Pedro’s equipment cleaning process or practice, the Board cannot presume that equipment cleaning activities causing potential discharges occurred at the time of, or prior to, all of the forty-nine rain days cited by the Region’s expert.<sup>21</sup> To determine liability and an appropriate penalty based on this record, the Board determined the number of days there was sufficient rainfall on or after May 17, 2007 (the first known date of equipment cleaning). The Board finds that the Region established by a preponderance of the evidence that San Pedro violated section 301(a) of the CWA by discharging storm water from an industrial point source into the waters of the United States without a permit on three days during the alleged period of violation.<sup>22</sup>

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<sup>21</sup>The Board is not concluding that no other equipment was cleaned at San Pedro during the period of violation alleged in the complaint, just simply that based on the record before the Board, the Region only established the time of one incident of equipment cleaning pursuant to the cleaning practices listed in the SWPPP. The Board also is not suggesting that only an inspector’s visual observation or other direct evidence can establish the time of equipment cleaning. For example, other evidence could include the testimony of employees on site, company records showing the time of incidents of equipment cleaning, and/or a schedule for cleaning of equipment that is followed regularly.

<sup>22</sup> San Pedro argues in its brief that the Region produced no evidence that pollutants actually were discharged into the waters of the United States, and thus, it is impermissible to find a violation based on a potential or theoretical discharge. San Pedro Resp. Br. at 13-17. The Board disagrees. There is ample evidence in the record of the presence of surface pollutants at this site. See R9 Post-Hearing Br. at 23-28. Moreover, storm water discharges from covered facilities are considered “to be ‘associated with industrial activity’ regardless of the actual exposure of these same materials or activities to storm water.” 55 Fed. Reg. at 48,008; see also *NRDC v. EPA*, 966 F.2d 1292, 1304 (9th Cir. 1992) (“the language ‘discharges associated with industrial activity’ is very broad” and “[t]he operative word is ‘associated’”; thus, “[i]t is not necessary that storm  
(continued...)

*See NOAA, Record of Climatological Observations: Long Beach Daugherty Field 25 (CX 13, at 25) (reporting 0.33 inches of rainfall on September 22, 2007, 0.41 inches on October 13, 2007, and 0.73 inches on December 18, 2007).*

3. *Count 2 Liability: Failure to Apply for NPDES Storm Water Permit Coverage*

In addition to alleging that San Pedro discharged pollutants into waters of the United States without a permit (Count 1), the Region alleged in Count 2 that San Pedro also violated section 308(a) of the CWA, 33 U.S.C. § 1308(a), and 40 C.F.R. § 122.21, by failing to timely submit either a “Notice of Intent” to be covered under California’s general storm water permit or an application for an individual NPDES permit. There is no dispute of fact on this question. The record plainly establishes that San Pedro did not file either a general or individual permit application prior to its first established industrial discharge on September 22, 2007, and thereby violated the permit application regulations at 40 C.F.R. § 122.21. *E.g.*, Answer to Administrative Compl. ¶¶ 14, 16, 21, at 4-5.

It is an unsettled question of law, however, whether such a violation of EPA’s permit regulations also constitutes a violation of section 308(a) of the statute, as alleged in the complaint. *See* Compl. ¶¶ 38-39, at 7-8. To date, the Board has not been required to address the question of whether failure to submit a timely permit application constitutes a violation of section 308(a). *See, e.g., In re Service Oil, Inc.*, CWA Appeal No. 11-01, at 8 n.3 (EAB Dec. 7, 2011) (Final Decision

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<sup>22</sup>(...continued)

water be contaminated or come into direct contact with pollutants; only association with any type of industrial activity is necessary”). The storm water rule “requires all dischargers through municipal separate storm sewer systems [MS4s] to apply for an individual permit, apply as part of a group application, or seek coverage under a promulgated general permit for storm water discharges associated with industrial activity.” 55 Fed. Reg. at 48,006. As noted previously, San Pedro’s drains divert storm water from the facility’s surfaces into the City of Los Angeles’ MS4, which ultimately discharges into waters of the United States.

and Order). The United States Court of Appeals for the Ninth Circuit (where the Board's decision in this matter will be heard if it is appealed) also has not addressed this issue. However, since the Region's filing of the complaint on September 29, 2009, two other federal circuit courts have ruled that EPA lacks statutory authority to assess penalties for a failure to apply for an NPDES permit pursuant to section 308(a). *See Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 751-53 (5th Cir. 2011); *Service Oil, Inc. v. EPA*, 590 F.3d 545, 549-51 (8th Cir. 2009). The Region attempted to distinguish these decisions in its post-hearing brief to the ALJ. *See* R9 Post-Hearing Br. at 37-42. San Pedro responded to the Region's arguments by contending that the ALJ should follow the Fifth and Eighth Circuit rulings on this issue. *See* San Pedro Reply to R9 Post-Hearing Br. at 11-13 (filed June 8, 2011).

The Board declines to decide this question at this time. Based on the facts of this case, the Board is not willing to impose a separate penalty for Count 2. Accordingly, the Board does not need to reach the unsettled question of whether failure to submit a timely permit application constitutes a violation of section 308(a).

4. *Count 3 Liability: Failure to Comply with General Storm Water Permit Requirements to Develop an Adequate SWPPP and Monitoring Program*

To establish liability for Count 3, the Region must show by a preponderance of the evidence that San Pedro violated the terms of the storm water permit it obtained on December 24, 2007, by failing to develop and implement a SWPPP and a storm water monitoring program "when industrial activities [began]." General Permit §§ A.1.a, B.1.a, at 11, 24. In its post-hearing brief to the ALJ, the Region correctly noted that "[a]ny permit noncompliance constitutes a violation of the [CWA] and is grounds for enforcement action." R9 Post-Hearing Br. at 43 (citing 40 C.F.R. § 122.41(a) (duty to comply)); *see* CWA § 402(p)(3)(A), 33 U.S.C. § 1342(p)(3)(A) ("[p]ermits for discharges associated with industrial activity shall meet all applicable provisions" of CWA sections 402 and 301).

The complaint alleged that San Pedro allowed forty-six days to elapse between its securing authorization to be covered under California's storm water general permit on December 24, 2007, and its providing to EPA the written SWPPP and storm water monitoring program documents on February 8, 2008. *See* Compl. ¶¶ 43-44, 47-48, at 8-9. The Region's post-hearing brief, however, altered these allegations to acknowledge that San Pedro completed its development of the SWPPP and monitoring plan on January 23, 2008. R9 Post-Hearing Br. at 43, 45. Accordingly, the Region essentially alleged that the failure to *develop* the two documents only ran twenty-nine days, from December 24, 2007, to January 23, 2008, while the alleged failure to *implement* the SWPPP continued to extend for forty-six days, from December 24, 2007, to February 8, 2008. *See id.*

The evidence in the record paints a different picture, however. It establishes that the Region granted San Pedro an extension of time, until January 13, 2008, to submit to EPA its SWPPP and monitoring program plan. *See* E-mail from Rick Sakow, CWA Compliance Office, EPA Region 9, to John Glaser, Counsel for San Pedro Forklift, Inc. (Dec. 21, 2007) (CX 32). On January 18, 2008, San Pedro informed the Region that Frog Environmental, Inc., its storm water consultant, had completed the SWPPP and implemented best management practices set forth therein. *See* Letter from John C. Glaser, Glaser, Tonsich & Associates LLP, to Michael Sakow & Mike Massey, Esq., EPA Region 9, at 2 (Jan. 18, 2008) (CX 33). The Region subsequently telephoned San Pedro on February 4, 2008, to inform the company that its January 18th response was insufficient in certain particulars. In the course of that conversation, the parties agreed that San Pedro would submit the SWPPP and other required documents to EPA with a postmark no later than February 8, 2008. *See* E-mail from Rick Sakow, CWA Compliance Office, EPA Region 9, to John Glaser, Counsel for San Pedro Forklift, Inc. (Feb. 4, 2008) (CX 34); Notes of Rick Sakow, EPA Region 9, from February 4, 2008 Telephone Conversation with John Glaser (CX 30).

On February 7, 2008, San Pedro mailed the SWPPP and other information to EPA, including photographs showing clean-up and

containment work it already had conducted at the facility. *See* Letter from John C. Glaser, Glaser, Tonsich & Associates LLP, to Mike Massey, Esq. & Rick Sakow, EPA Region 9 (Feb. 7, 2008) (CX 35). Evidence from mid-December 2007 suggests that much of this work began well before the permit issuance date, December 24, 2007. *See, e.g.*, Letter from John C. Glaser, Glaser, Tonsich & Associates LLP, to Mike Massey, Regional Counsel, EPA Region 9, at 3 (Dec. 12, 2007) (CX 31) (Response to Item No. 24) (“San Pedro Forklift implemented best management practices, eliminating and/or containing on-site liquid substances”); *id.* (Response to Item No. 25) (Notice of Completion of Interim Measures, including implementation of Best Management Practices); *id.* at 4 (Response to Item No. 27) (“San Pedro Forklift implemented Best Management Practices to contain spills and has installed cover and containment systems for the outdoor storage area to prevent discharges of pollutants through the storm drains”).

Based on the record before the Board, there is not a preponderance of the evidence establishing that San Pedro allowed forty-six or even twenty-nine days to elapse before completing tasks required by its permit. Instead, the record shows that San Pedro was in frequent contact with EPA, that EPA granted the company several extensions of time, and that in the interim many clean-up and containment activities took place on the facility’s grounds. Accordingly, the Board finds that the administrative record does not establish San Pedro’s liability for the alleged violations set forth in Count 3 of the complaint, as amended by the Region’s post-hearing brief.

#### 5. *Conclusion on Liability*

The Board therefore holds that the Region established by a preponderance of the evidence that San Pedro unlawfully discharged storm water associated with industrial activity to waters of the United States on three days between May 17, 2007, and December 24, 2007.

## VIII. PENALTY

Section 309(g)(2)(B) of the CWA and the Civil Monetary Penalty Inflation Adjustment Rule at 40 C.F.R. part 19 authorize a maximum civil administrative penalty of \$11,000 per day per violation, with a total maximum penalty of \$157,500.<sup>23</sup> See CWA § 309(g)(1)(A), (2)(B), 33 U.S.C. § 1319(g)(1)(A), (2)(B); 40 C.F.R. § 19.4. To determine an appropriate penalty under the CWA, the Agency is required to take into account “*the nature, circumstances, extent and gravity of the violation, or violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.*” CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3) (emphasis added).

The CWA “prescribes no precise formula by which these factors must be computed” or otherwise evaluated. *In re Britton Constr. Co.*, 8 E.A.D. 261, 281, 278 (EAB 1999). Moreover, EPA has not issued civil penalty guidelines specific to the CWA to assist in formulating CWA penalties. Accordingly, “highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the [CWA].” *Tull v. United States*, 481 U.S. 412, 426-27 (1987); see *In re Cutler*, 11 E.A.D. 622, 645 (EAB 2004) (“judges may exercise discretion in calculating appropriate penalties and may depart from a proposed penalty based on an Agency policy if they explain their reasons for the departure”). The Board, however, did consider two general civil penalty guidelines developed by the Agency for assistance in crafting penalties where, as here, no statute-specific guidance is available. See EPA General Enforcement Policy #GM-21, *Policy on Civil Penalties 3-4* (Feb. 16, 1984) (CX 8) [hereinafter *General Policy*]; EPA General Enforcement Policy #GM-22, *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA’s Policy on*

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<sup>23</sup> The Region’s proposal of \$177,500 in the complaint as the maximum available penalty is incorrect, as that figure applies only to violations that occur after January 12, 2009, i.e., beyond the period of violation alleged in this case. See 40 C.F.R. § 19.4 tbl. 1.

*Civil Penalties* 17, 23-24 (Feb. 16, 1984) (CX 9) [hereinafter *Penalty Framework*].<sup>24</sup>

In this case, the ALJ did not rule on questions of penalty because she found no regulatory jurisdiction and thus no CWA liability to penalize. The parties, however, thoroughly litigated penalty issues at the hearing and presented penalty arguments in their post-hearing briefs. *See, e.g.*, Tr. at 718-1001, 1009-1305; R9 Post-Hearing Br. at 55-73; San Pedro Post-Hearing Br. at 13-16. The Board therefore has an adequate record upon which to draw to decide a penalty amount.

#### A. *Economic Benefit or Savings*

The recovery of any economic benefit that has accrued to a violator as a result of its noncompliance with environmental laws is a critical component of the Agency's civil penalty program. *In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 207 (EAB 1997), *appeal dismissed as moot*, 200 F.3d 1222 (9th Cir. 2000); *see General Policy* at 3 ("it is Agency policy that penalties generally should, at a minimum, remove any significant economic benefits resulting from failing to comply with the law"); *accord Policy Framework* at 6. This is especially true in enforcement matters brought under environmental statutes, such as the CWA, where the statutory criteria require a consideration of the "economic benefit or savings (if any) resulting from the violation."

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<sup>24</sup> At the hearing before the ALJ, San Pedro objected to the Region's use of these two guidelines to assist it in determining a recommended penalty on the basis that the company did not have adequate notice of them. *See* Tr. at 1018-28. The Board notes that these two documents are available on EPA's website at [www.epa.gov](http://www.epa.gov) and provide "[a]n outline of the general process for the assessment of penalties," and the Agency "urge[s] administrative law judges to impose penalties consistent with this policy." *General Policy* at 1. The overarching goals of the penalty policies are "deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems." *Id.* "Although [the policies do not] have the force of law, [they are] consistent with the congressional policy behind the [CWA]." *SPIRG v. Hercules, Inc.*, 29 Env't Rep. Cas. (BNA) 1417, 1418 (D.N.J. 1989); *see also PIRG of N.J., Inc. v. Magnesium Elektron, Inc.*, 40 Env't Rep. Cas. (BNA) 1917, 1927 (D.N.J. 1995) ("the EPA methodology [in the penalty policies] is an appropriate guide in assessing a penalty against defendant" in a CWA case).

CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3). Economic benefit is typically calculated as a measure of “delayed costs,” “avoided costs,” and/or the “benefit from competitive advantage gained through noncompliance.” *Britton*, 8 E.A.D. at 287; *Penalty Framework* at 6-11.

In the present case, the Region contracted with Mr. Jonathan Shefftz to calculate the economic benefit, but ultimately the Region did not call Mr. Shefftz as a witness or successfully introduce other evidence of economic benefit in this case. *See* Tr. at 1112-26. As a result, the economic benefit report is not part of the administrative record before the Board.<sup>25</sup> The Board therefore finds no basis in the record for determining that San Pedro received a significant economic benefit from its noncompliance.<sup>26</sup>

*B. The Nature, Circumstances, Extent, and Gravity of the Violations*

There are a number of factors the Agency can consider to assess the nature, circumstances, extent, and gravity of San Pedro’s violations, including actual or possible harm (whether and to what extent San Pedro’s activity actually resulted or was likely to result in an unpermitted discharge); the amount of pollutant; toxicity of the pollutant; sensitivity of the environment; the length of time a violation continued; and the importance of the permitting requirements to achieving the goals of the CWA. *See, e.g., Penalty Framework* at 13-16. The Board finds that the three discharges of industrial storm water posed a risk of harm to the sensitive estuarine environment in the Dominguez Channel and beyond.

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<sup>25</sup> At the administrative hearing, the Region attempted to question Ms. Ellen Blake, the case development officer, regarding Mr. Shefftz’s economic benefit report. *See* Tr. at 1011, 1114-25. San Pedro’s counsel objected to the report as lacking a foundation, and the ALJ ultimately sustained the objection. Tr. at 1121.

<sup>26</sup> The Board notes that the costs of compliance for San Pedro would be comprised of the permit application fee, and the costs associated with developing a SWPPP, implementing best management practices, and implementing its storm water monitoring plan, which San Pedro ultimately incurred before the end of the period of violation that the Region alleged in its complaint. Accordingly, the Board believes that any economic benefit San Pedro realized by delaying these initial costs of compliance would be small, but does not have a basis in the record for determining them.

Dr. Peter Kozelka, a chemist introduced by the Region as an expert witness, testified that a variety of pollutants such as metals (e.g., zinc, copper, lead, iron), oil and grease, polycyclic aromatic hydrocarbons (“PAHs”), and possibly polychlorinated biphenyls can be removed from forklifts during rinsing operations. Tr. at 796-97, 876-77. The evidence in the record indicates that some of these pollutants are possible or probable carcinogens, damaging marine organisms on the cellular level, while others inhibit the growth and reproduction of a diverse array of marine life, including sea urchins and fish. Tr. at 797, 865-66, 876-78; see CX 47, 49. Other evidence indicates that sediment also can be removed during rinsing operations. Tr. at 1057-58. When discharged with industrial storm water into waters of the United States, sediment smothers fish eggs and triggers avoidance behaviors in fish, which have difficulty breathing and finding food in sediment-laden waters. See Tr. at 867-69.

The nature of these environmental harms are important in and of themselves, but that importance is magnified by the sensitivity of the environment at issue in this case. See *Penalty Framework* at 15. In 2006, EPA and the State of California designated the Dominguez Channel Estuary as “impaired” under section 303(d) of the CWA for copper, lead, zinc, sediment toxicity, benthic community effects,<sup>27</sup> PAHs, and a number of other pollutants. CX 20, at 30; see Tr. at 1073-75; R9 Post-Hearing Br. at 63-64 & n.28. These designations indicate that the Estuary is incapable of fully supporting all of its designated uses, such as providing fish spawning habitat. CX 20, at 30; see Tr. at 754, 869, 1073-75. Moreover, the National Marine Fisheries Service classifies the Dominguez Channel Estuary and Los Angeles Inner Harbor as “Essential Fish Habitat” for groundfish, including rockfish. Tr. at 1237; see CX 21-23. This evidence shows that it is more likely than not that the aquatic ecosystem into which San Pedro discharged its industrial storm water already is under considerable stress. San Pedro’s

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<sup>27</sup> Benthic communities consist of aquatic organisms, structural formations, and substrate located at or near the bottom of water bodies that are periodically or permanently covered by water. *E.g.*, 15 C.F.R. § 922.3; see Tr. at 751 (“worms, shellfish, [and] fish” are examples of benthic organisms).

industrial storm water discharges actually resulted in, or were likely to result in, further harm to this sensitive watershed.

In terms of the harm to the regulatory program caused by San Pedro's discharges of industrial storm water without an NPDES permit, the Board and its predecessors have held that discharging without a permit or conducting other unlawful activities may cause significant harm to the relevant regulatory program. *See In re Phoenix Constr. Servs.*, 11 E.A.D. 379, 396-400 (EAB 2004) (collecting cases). The CWA permitting requirements "go to the very heart" of the storm water program, which cannot successfully function to "restore and maintain the chemical, physical, and biological integrity" of our Nation's waters if the permit requirements, such as SWPPP preparation and implementation requirements, are disregarded or delayed. *See id* at 398-400 (failure to obtain permit prior to discharging pollutants into wetlands creates harm to CWA section 404 regulatory program); *In re Everwood Treatment Co.*, 6 E.A.D. 589, 602-03, 605 (EAB 1996) (failure to obtain permit prior to disposing of hazardous waste creates harm to regulatory program under Resource Conservation and Recovery Act), *aff'd*, No. 96-1159-RV-M (S.D. Ala. Jan. 21, 1998). The purpose of obtaining an NPDES permit is to ensure careful consideration of the discharges' environmental impacts and to impose on dischargers appropriate conditions to minimize or eliminate harmful impacts. *See, e.g., Kelly v. EPA*, 203 F.3d 519, 522 (7th Cir. 2000) ("[t]he purpose of requiring federal approval beforehand is to prevent or minimize aquatic damage"); *Phoenix Constr.*, 11 E.A.D. at 399 ("the obtaining of permits and the following of such conditions is *critical* to the basic purpose of \* \* \* the CWA").

Notably, the violations established by the Region total three days of discharge, rather than the forty-nine days the Region used to calculate its proposed penalty of \$120,000. A general rule of thumb is that "the longer a violation continues uncorrected, the greater is the risk of harm." *Penalty Framework* at 15. The lower number of discharge days that the Region actually proved in this case by a preponderance of the evidence warrants a less substantial penalty than the Region proposed. After carefully considering the range of penalties authorized under the CWA

(up to \$11,000 per day), and the nature, circumstances, extent, and gravity of the violations in this case, the Board assesses an initial penalty of \$2,000 per day for the unpermitted industrial storm water discharges that occurred at San Pedro's facility on three days in 2007, for a total of \$6,000.

C. *Ability to Pay, Prior History of Violations, Degree of Culpability, and Other Matters as Justice May Require*

The Agency can use certain specific attributes of the violator (ability to pay, prior history of violations, and degree of culpability), as well as other matters as justice may require either to increase or decrease an initial penalty. *See, e.g., Penalty Framework* at 17. In this case, the Board finds no basis to alter its initial penalty based on San Pedro's inability to pay. A financial report in the record indicates that San Pedro's 2009 sales volume exceeded one million dollars, CX 2, at 2-3, and San Pedro neither claimed it could not pay the penalty proposed by the Region, nor proffered any financial documentation to support such a claim. The Board also finds no basis to alter the penalty based on a prior history of violations, of which there is no evidence in the record before the Board, or for other matters as justice may require, of which there are none to the Board's knowledge. *See R9 Post-Hearing Br.* at 70-71.

The last statutory penalty factor to consider is culpability. The Region adjusted its proposed penalty upward by a factor of twenty percent (20%) to reflect San Pedro's degree of culpability. *Id.* at 71-74. The Region's inspector testified that the Port of Los Angeles had provided written notice to San Pedro in June 2003 and May 2004 with information about the storm water program, stating that permit coverage might be required for San Pedro's activities, and thus San Pedro "was aware or should have been aware of its permit obligations." *Id.* at 72; *see Tr.* at 274-75, 279-81; *Suppl. CX 2, 6.* In its second letter to San Pedro, which the Port sent because San Pedro did not respond to the first letter, the Port specifically asked San Pedro to inform the Port if it believed it was not subject to the permit requirements. *Suppl. CX 6.* San Pedro did not respond to that letter, nor apply for coverage under the

General Permit until December 2007. *See* R9 Post-Hearing Br. at 72; CX 31 at 2. The Region also argued that San Pedro “is a sophisticated business, accustomed to regulation,” and thus the company should be assessed a substantial penalty increase for the culpable acts or omissions that resulted in it paying no heed to the storm water rules. R9 Post-Hearing Br. at 72. On cross-examination at the penalty phase of the hearing before the ALJ, San Pedro’s attorney repeatedly suggested through his questioning that San Pedro may not have sought a permit because San Pedro in good faith (and possibly relying on the advice of its counsel) believed it fell within an SIC code that was exempt from the storm water regulations. Tr. at 1271-90.

The Board is persuaded that the Region is correct in these assessments, and therefore adds a twenty percent increase to its initial penalty (i.e., \$1,200) to represent an additional penalty for San Pedro’s culpability. San Pedro knew or should have known of its permit obligations, and the Board does not find that the circumstances of this case or any inaccurate legal advice San Pedro may have received provide a justifiable basis for adjusting the culpability factor. To hold otherwise would encourage ignorance of the law and/or negligence to adequately follow up on directives intended to inform parties of their regulatory obligations.

#### *D. Penalty Conclusion*

In sum, after applying the statutory factors in CWA section 309(g)(3) to the facts of this case, the Board assesses a civil administrative penalty of \$7,200 against San Pedro for discharging storm water associated with industrial activity without an NPDES permit on three days in 2007.

### IX. ORDER

Accordingly, the Board holds that San Pedro Forklift, Inc. unlawfully discharged storm water associated with industrial activity to waters of the United States on three days between May 17, 2007, and December 24, 2007, and assesses a monetary penalty of \$7,200 for those

violations. Payment of the entire amount of the civil penalty is due within thirty (30) days of service of this Final Decision and Order, unless otherwise agreed to by the Region. Payment may be by certified or cashier's check, payable to the Treasurer, United States of America, and forwarded to:

United States Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
Post Office Box 979077  
St. Louis, Missouri 63197-9000

A transmittal letter identifying the case name and the EPA docket number, plus San Pedro's full name and address, must accompany payment. 40 C.F.R. § 22.31(c). San Pedro must serve copies of the check or other instrument of payment on the Regional Hearing Clerk and on the Region. If appropriate, the Region may modify the above-described payment instructions to allow for alternative methods of payment, including electronic payment operations. Failure to pay the penalty within the prescribed time may result in assessment of interest on the penalty. See 31 U.S.C. § 3717; 40 C.F.R. § 22.31(c).

So ordered.

***Judge McCabe, partially concurring and partially dissenting:***

I concur in all aspects of the Board's decision with the exception of the conclusion in Part VII.B.1.a. that the evidence fails to establish the existence of a vehicle maintenance shop at San Pedro's facility by a preponderance of the evidence in this case.

I concur in the Board's legal conclusion in Part VII.A.2.b. that to establish the existence of a "vehicle maintenance shop" within the meaning of the storm water regulations, "the Agency has to prove by a preponderance of the evidence that there is a nontransient area or location that is designated for vehicle maintenance or where vehicle maintenance is conducted on a regular or repeated basis, including

intermittently or sporadically.” However, I respectfully dissent from the Board’s conclusion in applying that standard to the facts established in the record in this case. In my view, the preponderance of the evidence in this case meets the articulated standard and establishes that San Pedro was conducting a vehicle maintenance shop at its facility.

San Pedro’s own expert witnesses, Mr. Bulot and Mr. Severini, testified that San Pedro’s owners stated that a third-party company periodically came on-site to conduct minor forklift maintenance such as changing or topping off hydraulic oil, engine oil and fuel, then removed the used fluids from the site, Tr. at 1427-31, and that there was “occasional topping off of hydraulic fluid.” Tr. at 1611. This is supported by the evidence in the SWPPP, in which San Pedro acknowledges storing diesel fuel, engine oil, hydraulic fluid, transmission fluid, and coolant on site, as materials necessary for daily operations. The impression that vehicle maintenance activities were being conducted on a regular or repeated basis on this site is further supported by the inspector’s observation of the two fifty-five-gallon metal drums sitting on pallets in the northeastern portion of the facility. The inspector noted that one of these drums was coated with a black oily substance exuding petrochemical odors, that there were dark stains (suggesting spillage) on the underlying pallet and concrete, and that the other drum was surrounded by smaller containers with spouts for pouring. *See supra* Part V.

The ALJ concluded that the evidence “supported the conclusion that [San Pedro] was conducting occasional activities that might properly be termed maintenance of vehicles and equipment.”<sup>28</sup> Init. Dec. at 29. I agree with this conclusion. Further, I believe that this evidence shows that maintenance of the forklifts was a repeated, if not a regular, activity at this facility. While the ALJ did not find the evidence sufficient to

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<sup>28</sup> There appears to be no dispute that forklifts, used as a means of transloading goods at the site, are “vehicles” within the common definition of that term. *See Webster’s* at 2538 (a “vehicle” is “a means of carrying or transporting something”). Forklifts can also be considered “equipment” within the common meaning of that term. *Id.* at 768 (“equipment” includes “the implements (as machinery or tools) used in an operation or activity”).

meet her definition of a “vehicle maintenance shop” (e.g., due to the lack of a discrete structure, or a sufficient volume, level and concentration of outdoor repair activity), the Board has rejected that definition as overly narrow, as described in Part VII.A.2.c. above.

The preponderance of the evidence in this case persuades me that the Agency has made the demonstration required by the Board that there is a “nontransient area or location that is designated for vehicle maintenance or where vehicle maintenance is conducted on a regular or repeated basis, including intermittently or sporadically” at this facility. “Preponderance of the evidence” requires only that the fact-finder be persuaded that the proffered fact is more likely than not, based on the balance of the evidence offered by the parties. *See* Black’s Law Dictionary 1301 (9th ed. 2009) [hereinafter Black’s].<sup>29</sup> The ALJ’s factual conclusion that the evidence demonstrates that “occasional” vehicle maintenance activity was taking place at this facility is well-supported in the record, and it seems to me that “occasional” activity is sufficient to meet the Board’s standard, which expressly includes “intermittent” or “sporadic” vehicle maintenance activities.

The Board’s decision requires that the Agency demonstrate specifically where on the facility the “vehicle maintenance shop” activity is occurring, and finds that the Agency has failed to do so in this case. I do not disagree that the Agency must demonstrate that there is an “area or location” on the facility where this activity is taking place. While the Agency’s evidence of that location is admittedly thin in this case, the

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<sup>29</sup> “Preponderance of the evidence” is defined in Black’s Law Dictionary as:

The greater weight of the evidence \* \* \*; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be. – Also termed *preponderance of proof*; *balance of probability*.

Black’s at 1301.

evidence persuades me that it is more likely than not that vehicle maintenance activity was taking place, at a minimum, in the northeastern portion of the facility where the large drums and pouring containers were located. It is also possible that vehicle maintenance activities were conducted in other areas of the site, or even over much or most of the site, e.g., if hydraulic or transmission fluids were “topped off” (in the language of San Pedro’s owners) wherever the vehicles happened to be parked or stopped. That scenario would not be surprising, given the relatively small size of this industrial facility. However, the evidence provided is insufficient to persuade the Board to draw that conclusion.

The Agency would be well-served in future cases to heed the Board’s direction to provide evidence as to the location of the vehicle maintenance activities that indicate the presence of a “vehicle maintenance shop.” It is not sufficient to state, as the Agency inspector did at the hearing in this case and as the Region appears to suggest on appeal, that “it does not matter” where vehicle maintenance activities take place on a facility. That overbroad view, taken to its extreme, could capture incidental, one-time acts of vehicle maintenance on private cars parked in an employee parking lot. Both Congress and the Agency have specified that this type of situation is not intended to be covered by the storm water program, as stated repeatedly in the regulatory and legislative history described in Part VI above. The evidence does not suggest that this case presents that type of situation. However, in order to prevent overbroad applications of the storm water regulations not intended by Congress or the Agency, it is important to pay attention to and respect the limitations reflected in the Agency’s selection of the particular terms used in the storm water regulations, including “vehicle maintenance shop,” as interpreted by the Board’s decision above.

## CERTIFICATE OF SERVICE

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

### **By First Class Certified U.S. Mail, Return Receipt Requested:**

Earnest J. Franceschi, Jr., Esq.  
Franceschi Law Corporation  
445 South Figueroa Street, 26th Floor  
Los Angeles, California 90071

John C. Glaser, Esq.  
Glaser, Tonsich & Associates, LLP  
2500 Via Cabrillo Marina, Suite 310  
San Pedro, California 90731

### **By U.S. EPA Pouch Mail:**

Julia A. Jackson, Esq.  
Daniel Reich, Esq.  
Richard Campbell, Esq.  
U.S. Environmental Protection Agency, Region 9  
Office of Regional Counsel (ORC-2)  
75 Hawthorne Street  
San Francisco, California 94105

Bryan Goodwin, Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street, Mail Code WST-1  
San Francisco, California 94105

### **By U.S. EPA Interoffice Mail:**

Steven Neugeboren, Esq.  
Associate General Counsel, Water Law Office  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W., Mail Code 2355A  
Washington, D.C. 20460

Date: April 22, 2013

  
Eurika Durr  
Clerk of the Board