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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX

In the matter of:	Docket No. CWA-9-2009-0006
San Pedro Forklift,	COMPLAINANT'S REPLY BRIEF
Respondent.	

Pursuant to 40 C.F.R. § 22.26 and the Presiding Officer's Order on Motions for Extension to File Post-Hearing Briefs (March 17, 2011), the United States Environmental Protection Agency ("EPA" or "the Agency"), Region IX ("Complainant") submits this Reply Brief.

I. RESPONDENT'S FACILITY WAS ENGAGED IN INDUSTRIAL ACTIVITY AND THEREFORE SUBJECT TO REGULATION UNDER THE CLEAN WATER ACT.

Clean Water Act ("CWA") Section 402(p) and 40 C.F.R. § 122.26(a) provide that an NPDES permit is required for discharges of storm water associated with industrial activity. For purposes of 40 C.F.R. § 122.26, transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221–25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations are considered to be engaging in "industrial activity." 40 C.F.R. § 122.26(b)(14)(viii).

Respondent contends that Complainant failed to establish that Respondent was subject to regulation under the CWA. Respondent claims that the only evidence that Complainant has to show that Respondent was a transportation facility, classified under a regulated SIC code which had a vehicle maintenance shop or equipment cleaning operations, is the "inaccurate" and "inconsistent" testimony and inspection report of EPA Inspector, Amy Miller. But the record does not support this contention. As explained in Complainant's Initial Brief, Complainant established these criteria not only through Ms. Miller's testimony and observations but also through Respondent's own witnesses and documentation, which corroborate Ms. Miller's findings.

Respondent also claims that EPA failed to accurately classify its activities under an SIC code that brings in within regulation under the CWA. The record does not support this claim. The Complaint classifies Respondent under the regulated SIC code 4213 which Respondent concedes is "the SIC code most applicable to San Pedro Forklift's operations." Resp. Br. at 1.

Although Ms. Miller's May 2007 inspection report refers to another regulated SIC code (4491), more than one SIC code can be applicable and Ms. Miller's testimony and inspection report describe activities at Respondent's Facility that apply to both SIC code 4213 and 4491. Compl. Br. at 13-16. Ultimately, Complainant identified Respondent's SIC code as SIC code 4213 in the Complaint, in part because Respondent referred to itself under SIC code 4213 in its NOI. Respondent's witness, Terry Balog, also testified at hearing that Respondent's SIC code is 4213. Consequently, Respondent's claim has no merit.

Additionally, Respondent argues Respondent is not covered by 40 C.F.R. § 122.26(b)(14)(viii) because it does not have "a maintenance shop or facility on the premises and an outside vendor is contracted to do the repairs and maintenance of the forklifts and any waste generated therefrom is carried off the premises." Resp. Br. at 1, 18.

First, Respondent fails to recognize that the relevant regulation applies to transportation facilities with either "equipment cleaning operations" *or* "maintenance shops." 40 C.F.R. § 122.26(b)(14)(viii). As explained in Complainant's Initial Brief, Respondent's Facility had equipment cleaning operations at all relevant times in this matter and was therefore within the scope of 40 C.F.R. § 122.26(b)(14)(viii), regardless of whether it also had a maintenance shop. Compl. Br. at 16-17.

Second, Respondent's argument relies on an extremely narrow reading of the term "maintenance shop," that appears to assume that it would apply only to a brick and mortar repair shop staffed by facility employees. However, Respondent's interpretation is inconsistent with the language of 40 C.F.R. § 122.26(b)(14)(viii), which provides in pertinent part:

> *Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication),* equipment cleaning operations, airport deicing operations, or which

> are otherwise identified under paragraphs (b)(14) (i)–(vii) or (ix)–(xi) of this section are associated with industrial activity;

(emphasis added). The emphasized language explains that the regulation is intended to include those *areas* of the facility where maintenance activities occur, regardless of whether there is a brick-and-mortar repair shop. This is consistent with how EPA addressed comments regarding a request to exclude "railroad *tracks* where rail cars are set aside for minor repairs" from regulation under 40 C.F.R. § 122.26(b)(14)(viii). 55 Fed. Reg. at 48013 (emphasis added). EPA declined to exclude such areas, and made clear that an application under the Act is required if any "rehabilitation, mechanical repairing, painting, fueling, and lubrication" occurs. *Id.*

Similarly, the definition does not differentiate between repairs performed by employees and those performed by contractors hired by Respondent; all that is necessary is that maintenance occurs at the facility itself. Therefore, even assuming *arguendo* that an outside vendor performs maintenance of the forklifts and "any waste generated therefrom is carried off the premises" the Facility would still have a "maintenance shop" if rehabilitation, mechanical repairs, painting, fueling, and/or lubrication of vehicles are performed on site.

Respondent's expert admitted at hearing that maintenance activities took place at the Facility and that Respondent stored materials used in forklift maintenance at its facility. Compl. Brief at 19-20 and 26. Additionally, while Respondent claims in its Initial Brief that all waste material associated with vehicle maintenance are currently removed from the site, it provided no supporting documentation or physical evidence corroborating its claim at hearing. Finally, Ms. Miller's observations during the 2007 inspection provide ample evidence of Respondent's maintenance activities during the relevant time period, including the storage of waste oil, diesel fuel, and lubricants. Compl. Br. at 18-20 and 24-25.

Thus, Respondent has not shown that it is not covered under 40 C.F.R. § 122.26(b)(14)(viii).

II. RESPONDENT DISCHARGED POLLUTANTS FROM THE FACILITY.

In addition Respondent argues that:

> The EPA's allegation of 57 incidents of discharging pollutants into the Dominguez Channel is not supported by one scintilla of evidence. Despite having the opportunity to do so, not one EPA investigator took any sampling of run-off from the premises of San Pedro Forklift. Not a single pollutant in the Dominguez Channel has been identified as coming from or being in any way associated with the activities of Respondent. In an attempt to bridge this gaping hole, the EPA relies on generalized theoretical models having no specific correlation to the activities taking place at San Pedro Forklift.

Resp. Br. at 7. In fact, Complainant properly relied on both on-site observations of pollutant sources and modeling, which was based on site specific topographic information and local rainfall data in order to establish the discharge of pollutants. *See* Compl. Br. at 21-28; *see also Leed Foundry*, 2007 EPA ALJ LEXIS 13, *49, EPA Docket Nos. RCRA 03-2004-0061; CWA 03-2004-0061 (April 24, 2007)(Initial Decision). Contrary to Respondent's bald assertions, Complainant is not required provide specific discharge sampling data in order to establish liability for the discharge of pollutants from Respondent's Facility. "At the outset, we note that in our legal system, juries in both civil and criminal cases are charged that they may rely on both direct and circumstantial evidence as proof of a fact. It is thus absurd for [the defendant] to complain about the use of circumstantial evidence in this case." *Colbro Ship Management Co., Ltd. v. United States*, 84 F. Supp. 2d 253, 259 (D. Puerto Rico 2000)(circumstantial evidence can be used to establish liability under Section 311 of the CWA even under a "substantial evidence" standard), *see also In re Lowell Vos Feedlot*, EAJA Appeal No. 10-01, slip op. at 11. (EAB, May 9, 2011). As discussed in its Initial Brief, Complainant identified ample sources of pollution that were exposed to numerous rain fall events between 2004 and 2008. Further,

Respondent's own sampling indicated that Respondent continued to discharge pollutants even after cleaning the site and covering many pollutant sources. Compl. Br. at 28 n 13.

Respondent claims that Ms. Miller's testimony regarding her observations of forklift washing are "the lynch pin of the EPA's entire pollution discharge allegation." Resp. Br. at 8. However, evidence of other pollutant sources exposed to storm water at the Facility is overwhelming, including not only EPA Inspector Miller's testimony and photographs of an oil-covered barrel, buckets of oil and hydraulic fluid, equipment wash water, painting equipment, a battery, and trash, but also Respondent's own SWPPP and testimony from its experts and owner. Compl. Br. at 23-27.

Respondent's effort to characterize the wash water depicted in Photograph 8 of the 2007 Inspection Report as "condensate" was, at best, inconsistent. For example, Mr. Balov testified that on a regular basis, the condensation and ice on the goods melt and "sometimes pour out" when the container is opened, to the point he always wears rain gear to avoid getting "soaked." Tr. 1983:1-10; 1986:19-1987:19. Yet, further into his testimony he admitted that, "typically there is not that much water" such that it would flow off the sides of the dock as shown in Photograph 8. Tr. 2128:21-2129:4. He also testified that the water depicted in Photograph 8 was in a straight line, not because it was pushed with a broom as Ms. Miller observed, (Tr. 119:3-10) but because the condensate "would come out, straight across in front of that forklift, and straight across to the other edge of the dock." Tr. 1984:1-4. However, Ms. Miller's explanation is supported by the presence of a broom leaning against a post near the wet loading dock, and is much more plausible than Mr. Balov's inconsistent explanation that water would come "rolling out onto the dock" in a straight line. *See* Compl. PHE Ex. 15, Photograph 8; Tr. 119:8-10, 1979:4-9, 2128:21-22.

It should be noted that in making its case, Respondent mischaracterized the testimony of Ms. Miller and Mr. Balov on several occasions. For example, Respondent claims Ms. Miller testified that "no one was present at the facility other than the person she spoke with in the office" during her May 2007 inspection. Resp. Br. at 9. Ms. Miller actually testified that, after arriving at the Facility:

> I asked to speak to the person in charge and spoke to somebody who did not provide me his name. I presented my credentials, my inspector credentials to the person. Explained the purpose of our visit was to conduct a stormwater inspection and I asked to speak to somebody who had some knowledge about stormwater requirements for the specific facility or somebody I could talk to about stormwater requirements.
>
> The person indicated that there was nobody available to answer my questions and that I should call the facility at a later date. I asked if it would be okay to look around and he said yes.

Tr. 88:14-89:6. On cross examination, Ms. Miller again explained that:

> When I arrived at the facility, I asked to speak to the person in charge. And I told them why I was there, to conduct a stormwater inspection and I asked if he could speak about stormwater requirements and he said no and that I should contact the facility owner after the inspection.

Tr. 261:6-12.[1]

Respondent also mischaracterizes Mr. Balov's testimony regarding the absence of a spigot in Photograph 8. Mr. Balov never testified that "it would not be possible to wash the forklift depicted in Photograph 8 with a hose" due to the location of the water spigots. Resp. Br. at 11. Rather, Mr. Balov said that the total distance from the nearest spigot to the forklift depicted in Photograph 8 was anywhere from thirty feet to sixty feet (Tr. 1979:19-1981:13); he also admitted that garden hoses were kept at the Facility. Tr.1981:14-19. Although Mr. Balov

[1] Respondent's brief also misquotes Ms. Miller's testimony when it states that Ms. Miller testified she saw several sources of pollution before she got out of her car. Resp. Br. at 12. Ms. Miller actually testified that she saw numerous sources of pollution *as she entered* the facility and that she wanted to "get an overall assessment of the facility" before she began taking photographs. Tr. 2223:15-2225:4.

initially stated that these hoses were meant for fumigation, he later admitted that fumigation hoses and water hoses were the same type of hose. Tr. 2133:8-11, 2137:21-2138:5. It is certainly possible that such a hose could be used to carry water a distance of thirty to sixty feet from the spigot to the loading dock where Ms. Miller saw the forklift being washed.

Finally, Respondent's assertion that "certain large blue barrels on the premises . . . were shown to be apple juice containers" Resp. Br. at 11, is also inaccurate. The only evidence to suggest that the barrel in Photograph 6 of the Inspection Report contained apple juice was Mr. Balov's own self-serving testimony, which was not corroborated by a single other witness or any physical evidence. Tr. 1998:6-2007:1, 2188:21-2189:4. As discussed in Complainant's Initial Brief, Mr. Balov's assertions regarding the apple juice are questionable. *See* Compl. Br. at 27-28. Respondent had previously admitted that the barrel in Photograph 6 was diesel fuel, Compl. PHE Ex. 35. Then at hearing Mr. Balov testified he "guessed" the container contained apple juice concentrate because that was their "main export" at that time and because it was in a blue barrel with a dispenser on top, without a label. Tr. 1998:10-1999:5. In fact, the barrel is labeled on the left side and on the top. *See* Compl. PHE Ex. 15, Photograph 6. Further, Mr. Balov contradicted himself by testifying that the juice concentrate business was sporadic, since it was just "one Cuban guy sending it over" to start a business. Tr. 2000:10-14. Finally, while Mr. Balov suggested that it was normal practice to store barrels in a covered area until they could be shipped out, Tr. 2001:1-7, he gave no explanation as to why this particular barrel of apple or orange juice concentrate was stored outside, on a pallet, exposed to the sun, alongside containers of lubricants and mechanical fluids. Tr. 2004:21-2005:14.

Thus, Respondent's attempts to explain away the extensive evidence of pollutant discharges at the Facility should not be credited.

III. THE 2011 NOTICE OF TERMINATION IS NOT IN THE RECORD AND IS IRRELEVANT TO THIS PROCEEDING

Finally, Respondent argues that the recent approval by the State Regional Water Quality Control Board ("Board") of Respondent's Notice of Termination ("NOT") of coverage under the General Permit "conclusively establishes that San Pedro Forklift was not required to obtain an NOI and was not subject to regulation at any time under the Clean Water Act." Resp. Br. at 4. The NOT is not currently in the record and Complainant opposes its inclusion for the reasons set forth in "Complainant's Response to Respondent's Motion to Augment Administrative Record or in the Alternative Request for Judicial Notice of Notice Of Termination" (June 3, 2011). Moreover, even assuming *arguendo* that the NOT were part of the record in this case, it would have no probative value as to the nature of the Facility's activities during the period of violation extending from October 1, 2004 to February 8, 2008. In particular, Respondent's assertion that "the activities of Respondent have been the same throughout the relevant time periods," is misleading, as the evidence cited, Exhibit 33, is a letter from Respondent's counsel dated January 18, 2008.[2] *Id.* At hearing, Mr. Balov confirmed that the letter contained an accurate description of the Facility's operations *at the time the letter was written.* Tr. 2169:5-2170:12. This testimony in no way establishes that Respondent's activities at the Facility have been the same *since* January 2008. The approval of the NOT by the Board in 2011 is thus irrelevant to the nature of Respondent's industrial activities during the time period of October 1, 2004 to February 8, 2008. Respondent's reliance on the NOT is therefore unfounded.

[2] Since Respondent's Exhibit 33 is the Resume of Anthony Severini, Complainant assumes that this refers to Complainant's Initial Pre Heading Exchange Exhibit 33.

IV. COMPLAINANT'S PROPOSED PENALTY IS BASED ON THE STATUTORY FACTORS AND APPLICABLE POLICIES.

Respondent contends that Complainant's proposed penalty violates Due Process and Equal Protection because "there appears to be no clear standards or guidelines intended to achieve uniformity in the calculation of the penalty." Resp. Br. at 13. Specifically, Respondent claims that the proposed penalty is based on standards and guidelines that have yet to be officially enacted, are nebulous at best, and lack clear, readily available public notice specifying what specific penalties will attach to certain violations of the CWA. Resp. Br. at 13, 16. In fact,

In this case, Complainant has reviewed the facts associated with the violation and presented a penalty that it believes is supported by the evidence. It is up to the Presiding Officer to consider the "record evidence in light of the penalty factors Congress has supplied," and recommend a civil penalty assessment, based on the statutory factors enumerated in CWA subsection 309(g)(3), 33 U.S.C. § 1319(g)(3). *C.L "Butch" Otter & Charles Robnett*, EPA Docket No. CWA-10-99-0202, 2001 EPA ALJ LEXIS 17, *38-39 (ALJ Charneski, April 9, 2001)(Initial Decision), *see also* 40 C.F.R § 22.27(b); Compl. Br. at 55. Complainant calculated its proposed penalty based on the CWA statutory penalty criteria set forth at CWA Section 309(g)(3), 33 U.S.C. § 1319(g)(3). Compl. Br. at 55. Therefore, there is no basis for Respondent's assertion that the standards have not been officially enacted as they are found in the statute.

Complainant was guided by EPA's general penalty policies, the "Policy on Civil Penalties: EPA General Enforcement Policy #GM-21" (Feb. 16, 1984)("GM-21"); and "A Framework for Statute-Specific Approaches to Penalty Assessments: EPA General Enforcement Policy #GM-22" (Feb. 16, 1984)("GM-22"). Compl. Br. at 55-56. In making a penalty determination, the Presiding Officer must consider the relevant civil penalty policies, but she is

not bound by them as they do not have the force of law. *In re Robert Wallin*, 10 E.A.D. 18, 25 n. 9 (EAB, 2002)(Presiding Officers are not required to follow GM-21 and GM-22, "since such policies, not having been subjected to rulemaking procedures of the Administrative Procedure Act, lack the force of law.").

It should be noted with respect to economic benefit, for the reasons set forth in its Initial Brief, Complainant has chosen to exercise its discretion under GM-22 not to purse economic benefit in this case. Compl. Br. at 70-71.

V. THE RISK OF HARM RESULTING FROM RESPONDENT'S DISCHARGE OF POLLUTANTS SUPPORTS EPA'S PROPOSED PENALTY.

Respondent also contends that Complainant's proposed penalty is unsupported by any proof at hearing. Respondent argues, in essence, that "samples have not been taken and there is no way it could be quantified and presented here in this trial," therefore, GM-21 and GM-22 cannot be applied. Resp. Br. at 14. Precise quantification of pollutant amounts in not necessary when considering the statutory penalty factors and assessing an appropriate penalty. The risk of harm from the types of pollutants discharged is sufficient to support a penalty. GM-22 at 15. Complainant's Initial Brief details the ample evidence in the administrative record of the characteristics of the pollutants discharged from the Facility (i.e., their toxicity), Compl. Br. at 58-59, as well as the significant amount of these pollutants and storm water discharged from Respondent's Facility between October 1, 2004 and February 8, 2008. Compl. Brief, at 57-62. Thus, to the extent Respondent's objection as to this issue was preserved at hearing, it should now be denied.

In its Initial Brief, Respondent also vaguely refers to the "numerous objections" it made at hearing to the sufficiency of the evidence provided by EPA regarding the actual or possible harm associated with Respondent's violations, but focuses on Ms. Blake's use of photographs 8

and 9. Resp. Br. at 16. Respondent's argument appears to be that the Presiding Officer should discount these photographs as evidence of numerous pollutant sources because the photograph 8 does not depict active forklift washing and the area shown in Photograph 9 "was in actuality a staging area to assemble Respondent's fumigation structure."[3] *Id* at 9, 16. However, as Ms. Blake testified, Photograph 8, coupled with the inspection report that states that "washing occurs without controls" indicated that a significant amount of pollutants would discharge when it rained. Tr. 1060:1-1061:13. Conditions in the other photographs, including the amount of trash, sediment, and debris on the ground, indicate that there was a lack of best business practices to maintain the site and deal with waste materials. Tr. 1066:17-1067:10. As discussed in Complainant's Initial Brief, these photographs provide significant evidence of pollutant sources that would be expected to discharge heavy metals and other priority toxic pollutants in storm water. Compl. Br. at 8.

VI. EPA'S DECISION TO ADJUST THE PROPOSED PENALTY UPWARD DUE TO RESPONDENT'S CULPABILITY IS SUPPORTED BY THE FACTS ADDUCED AT HEARING.

In its Initial Brief, Respondent argues the proposed penalty should not be enhanced by twenty percent for culpability based on the outreach provided by the Port of Los Angeles to Respondent in 2003 and 2004 because "Ms. Prickett [Port employee] appeared not to be knowledgeable about Respondent's activities, and it is not clear how any enhancement could be based upon information that she provided the EPA, given her lack of familiarly with Respondent." Resp. Brief at 4. Respondent's argument misses the mark. Ms. Prickett's testimony is important because it demonstrates not what she told EPA, but that *Respondent* was informed of its obligations under the CWA in 2003. Compl. Br. at 72-73. Additionally, Respondent mischaracterized Ms. Prickett's testimony when it stated that she had a "lack of familiarity with

[3] Photograph 9 is actually a photograph of Respondent's roll-off bin. Photographs 4 and 10 depict the staging area or "boneyard."

Respondent." Resp. Br. at 4. Given that there are over 100 tenants in the Port's storm water program, it is not surprising that she could not "off the top of her head" remember San Pedro Forklift's SIC code from 2003. Tr. 287:16-288:18. In sum, Respondent could not refute the evidence of its culpability in failing to seek permit coverage and therefore the penalty should be increased 20 percent to account. Compl. Br. at 71-73.

VII. EQUAL ACCESS TO JUSTICE ACT REQUEST

Respondent's request for attorneys' fees and costs under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, is premature and lacks merit. Since Respondent requests that "a finding be made that EPA's prosecution of this action was not substantially justified," Resp. Br. at 18, Complainant assumes that Respondent is seeking an award under the so-called "prevailing party" provision of the EAJA, 5 U.S.C. § 504(a)(1), which provides, in relevant part, that:

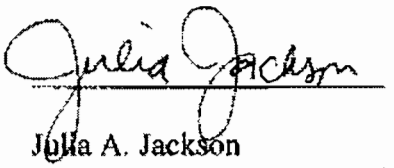
> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1). *See also* 40 C.F.R. § 17.5(a)(setting forth standards for awards under the EAJA in EPA administrative proceedings). The EAJA further provides that a party seeking such an award "shall, within thirty days of a *final disposition* in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought . . ." 5 U.S.C. § 504(a)(2) (emphasis added). In this case, there has been no final disposition and Respondent cannot therefore be deemed a "prevailing party." Respondent's request for fees is therefore premature and without merit.

VIII. CONCLUSION

For the reasons set forth in Complainant's Initial Brief and in the foregoing discussion, Complainant respectfully requests that the Presiding Officer find that Respondent (1) discharged pollutants without a permit in violation of CWA Section 301(a), 33 U.S.C. § 1311(a); (2) failed to submit information in a permit application in violation of CWA Section 308(a), 33 U.S.C. § 1318(a) and 40 C.F.R. § 122.21; and (3) discharged pollutants while not in compliance with a permit in violation of CWA Section 301(a), 33 U.S.C. § 1311(a). Complainant proposes a civil penalty in the amount of $120,000 for these violations.

Dated: June 10, 2011 Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Complainant's Reply Brief", dated June 10, 2011, was filed with the Regional Hearing Clerk and sent.

By Pouch Mail

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