UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
San Pedro Forklift,	)	**DOCKET NO. CWA-09-2009-0006**
	)	
RESPONDENT.	)	

INITIAL DECISION

Issued: January 27, 2012

Before: Barbara A. Gunning
Administrative Law Judge
U.S. Environmental Protection Agency

Appearances:

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I. PROCEDURAL HISTORY

On September 29, 2009, the United States Environmental Protection Agency ("EPA" or "Agency"), Region 9 Director of the Water Division ("Complainant" or "Region 9"), initiated this proceeding by filing a Complaint ("Complaint" or "Compl.") against San Pedro Forklift ("Respondent" or "San Pedro"). The Complaint was issued pursuant to Complainant's authority under Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA" or "the Act"), as amended, 33 U.S.C. § 1319(g). The Complaint alleges in three counts that Respondent violated federal regulations prohibiting the discharge of pollutants without a permit and requiring compliance with California's General Permit No. CAS000001/Water Quality Order No. 97-03-DWQ ("General Permit"), promulgated pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and codified at 40 C.F.R. part 122, and that Respondent thereby violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

Specifically, the Complaint alleges that Respondent discharged pollutants via stormwater runoff from its facility in San Pedro, California ("Facility"), into navigable waters without a CWA permit on at least 57 occasions between October 1, 2004, and December 24, 2007, the date on which Respondent obtained coverage under the General Permit. Compl. ¶¶ 30-36. The Complaint states that facilities "engaged in industrial activity, as defined by 40 C.F.R. § 122.26(b)(14), must obtain NPDES permit authorization if they discharge or propose to discharge storm water into waters of the United States." Compl. ¶ 4. The Complaint alleges that discharges from Respondent's Facility are "'storm water discharge[s] associated with industrial activity' as defined by 40 C.F.R. § 122.26(b)(14). Compl. ¶ 33. Specifically, the Complaint alleges that Respondent "is primarily engaged in trucking of recycled materials, an activity categorized under SIC [Standard Industrial Classification][1/]

[1/] The Standard Industrial Classification is a 20th Century system of categorizing industries established by the United States Government in the 1930s. In part due to criticism that the SIC system could not adapt to the rapid changes in the U.S. economy, it was replaced in 1997 by the North American Industry Classification System. *See* Bureau of Labor Statistics, *North American Industry Classification System (NAICS) at BLS*, (Sept. 9, 2011), http://www.bls.gov/bls/naics.htm. However, it is still used by some federal agencies, such as the Securities and Exchange Commission and the Occupational Safety & Health Administration. *See, e.g.*, http://www.osha.gov/pls/imis/sicsearch.html. The SIC Manual was last updated and published in 1987. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STANDARD INDUSTRIAL CLASSIFICATION MANUAL (1987) (LC Call Number: HF 1042 .S73 1987); *see also* C's Init. Ex. 26 and Ex. 60. In promulgating the stormwater regulations at issue in this matter, EPA opted to use the SIC system, along with specific narrative descriptions,
(continued...)

4213." Compl. ¶ 17. The Complaint states that "[t]rucking of recycled materials falls under Standard Industrial Classification (SIC) Code 4213 (Trucking) and, pursuant to 40 C.F.R. § 122.26(b)(14)(viii), is an industrial activity subject to the discharge and permitting requirements under Section 402(p) of the Act, 33 U.S.C. § 1342(p)." Compl. ¶ 5. It is noted that the undersigned is limited to these allegations.

The Complaint also charges Respondent, in Count 2, for failure to submit a Notice of Intent to be covered by the General Permit ("NOI") before "commencing industrial activities" in violation of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), and 40 C.F.R. § 122.21. Compl. ¶¶ 38-39. In the third count, Complainant alleges that once Respondent had obtained coverage under the General Permit, it failed to comply with the requirements to develop an adequate stormwater pollution prevention plan ("SWPPP") and monitoring program. Compl. ¶¶ 41-48.

On November 13, 2009, Respondent filed an Answer to Administrative Complaint and Notice of Opportunity for Hearing ("Answer") with the Regional Hearing Clerk ("RHC"). In its Answer, Respondent does not admit or deny (or deny for lack of knowledge) each factual allegation, instead offering a narrative response to each paragraph of the Complaint. Respondent does specifically deny "that a permit was required and/or implicates by way of this answer the Port of Los Angeles [the owner of the site] due to its failure of to [sic] limit storm water discharges from the facility and failure to obtain a NPDES [National Pollutant Discharge Elimination System] or SWPPP permit." Ans. ¶ 4. Respondent also disputes the rainfall data cited in the Complaint and argues that Respondent did not submit a SWPPP beyond the "'30 day' compliance period specified in the Order by EPA." Ans. ¶ 18. Further, Respondent denies all allegations set forth in Counts 2 and 3 of the Complaint. Ans. ¶¶ 22 and 26.

Pursuant to the Prehearing Order issued by the undersigned on April 14, 2010, the parties filed their prehearing exchanges sequentially. On July 8, 2011, the undersigned received Respondent's Motion for Leave to File a First Amended Answer to Administrative Complaint, served concurrently with the proposed First Amended Answer ("Amended Answer" or "Amd. Ans."). The Amended Answer did not make any changes to the original Answer, but sought leave to add three affirmative defenses.

[1/] (...continued)
"to define and identify Phase I sources (40 *CFR* 122.26(b)(14))." OFFICE OF WATER, U.S. EPA, STORM WATER DISCHARGES POTENTIALLY ADDRESSED BY PHASE II OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM STORM WATER PROGRAM REPORT TO CONGRESS ("Report to Congress"), at 4-4 (EPA 833-K-94-002) (March 1995).

The first affirmative defense alleges that Complainant "engaged in unreasonable and selective enforcement of the EPA Act, targeting Respondent, a tenant on the subject premises, for alleged violations which were caused or created by others and which pre-date Respondent's tenancy." (the "Selective Enforcement" defense). The second affirmative defense alleges that Complainant failed to provide "reasonable notice of the permitting requirements alleged in the Complaint with sufficient clarity and conspicuousness sufficient [sic] to place a reasonable person on notice of said requirements." (the "Fair Notice" defense). The third affirmative defense alleges that the proposed penalty violates the Eighth Amendment of the Constitution, barring the imposition of excessive fines.

Over Complainant's objection, Respondent was granted leave to amend its Answer to assert the first two affirmative defenses (Selective Enforcement and Fair Notice) but was denied leave to include the third affirmative defense as insufficient as a matter of law. *See* Order on Respondent's Motion for Leave to File a First Amended Answer to Administrative Complaint, issued August 11, 2010.

On July 13, 2011, following the submission of Respondent's prehearing exchange, Complainant filed a Motion to Strike certain proposed exhibits arguing that they constituted statements made by the parties as part of settlement negotiations and were inadmissible under Rule 22.22(a)(1). Respondent did not respond to the Motion to Strike. By Order issued August 4, 2011, Respondent's proposed exhibits (Nos. 5, 6, 9, 12-14, and 21) were stricken from the record.

By Order issued July 16, 2010, this matter was scheduled for hearing in Los Angeles, California, beginning October 25, 2010. The hearing was rescheduled to January 11, 2011, to accommodate pre-existing trial commitments for Respondent's counsel. On September 23, 2010, the hearing was rescheduled again to January 24, 2011, to accommodate the schedule of Complainant's primary fact witness and lead inspector.

On November 12, 2010, Complainant filed a Motion for Partial Accelerated Decision on Liability ("Motion for Accelerated Decision" or "C's MAD"). The Motion addressed only Counts 1 and 2 of the Complaint. Following a short extension, Respondent submitted its Response to the Motion for Accelerated Decision. Complainant's Reply followed on December 20, 2010. An Order Denying Complainant's Motion for Partial Accelerated Decision on Liability was issued on January 7, 2011, noting the absence of both specific responses to the allegations in the Answer and joint stipulations by the parties, and finding that genuine issues of material fact remained.

The Order denying the Motion for Accelerated Decision, by way of example, made specific note of one of the genuine issues of material fact that required a hearing on the merits. On the issue of the SIC Code, a threshold jurisdictional element, the undersigned observed that Complainant's reliance on documents that post-dated the period of alleged violation was an insufficient basis to grant accelerated decision. The undersigned noted that Respondent specifically disputed the types of activities that were actually occurring at the Facility, arguing that they were inconsistent with the SIC Codes identified by EPA in the Compliance Order, issued November 9, 2007, and the Inspection Report from May 2007. *San Pedro Forklift*, EPA Docket No. CWA-09-2009-0006, slip op. at 7 (ALJ, Jan. 7, 2011) (Order Denying Complainant's Motion for Partial Accelerated Decision on Liability).

On January 6, 2011, the parties submitted a Joint Stipulation for Administrative Hearing stating that the parties agreed that the following proposed exhibits were admissible at hearing: Complainant's Initial PHE Exhibits 1-61 ("C's Init. Ex."); Complainant's Rebuttal PHE Exhibits 1-15 ("C's Rebut. Ex."); Complainant's Amended PHE Exhibits 1-7 ("C's Amd. Ex."); Respondent's Initial PHE Exhibits 1-30 (except those exhibits stricken by the August 4, 2010, Order Granting Complainant's Motion to Strike) ("R's Init. Ex."), and Respondent's Amended PHE Exhibits A & B ("R's Amd. Ex."), submitted August 20, 2010, under the title "Pre-Hearing Exchange and Witness List." The parties did not stipulate to any facts or testimony.

On January 10, 2011, this Tribunal received a Motion for Supplemental Pre-Hearing Exchange and Witness List ("Motion to Supplement"), submitted by facsimile, in which Respondent sought leave to supplement its prehearing exchange with three formal reports of previously identified witnesses (2 expert, 1 fact) and to add two new witnesses to Respondent's Witness List for hearing. Despite Complainant's objection and after careful review of the record and Motion to Supplement, the Respondent was given leave to supplement its prehearing exchange with Supplemental Exhibits A-D ("R's Supp. Ex."). On January 21, 2011, Complainant submitted a Motion to Supplement Complainant's Prehearing Exchange, which consisted of 20 proposed, supplemental exhibits ("C's Supp. Ex."). While the Complainant's Motion to Supplement was granted, neither set of Supplemental Exhibits was covered by the January 6th Joint Stipulations.

An evidentiary hearing was conducted in this matter in Los Angeles, California from January 24-29, 2011, for the purpose of the presentation of evidence on the issues of Respondent's liability and the appropriateness of Complainant's proposed penalty. On April 22, 2011, Complainant filed a Motion to Conform the Transcript to the Testimony. Respondent did not file a response or another motion to conform the transcript. Upon

review of Complainant's Motion to Conform the Transcript, the proposed corrections are accepted and the motion is **GRANTED.**

On May 20, 2011, Complainant filed its Brief in Support of Complainant's Proposed Findings of Fact and Conclusions of Law ("Complainant's Post-Hearing Brief" or "C's Post-Hrg. Br."). On May 25, 2011, Respondent filed its Brief in Support of Findings of Facts [sic] and Conclusions of Law ("Respondent's Post-Hearing Brief" or "R's Post-Hrg. Br."). On June 10, 2011, Complainant filed a Reply Brief ("C's Post-Hrg. Reply"). On June 13, 2011, Respondent filed its Reply to Complainant EPA's Brief in Support of Complainant's Proposed Findings of Facts [sic] and Conclusions of Law ("R's Post-Hrg. Reply").

On June 16, 2011, the undersigned received two motions from Respondent seeking to augment the record with (or in the alternative to have judicial notice taken of) a copy of the Notice of Termination dated April 7, 2011, as well as black and white printed pages from the Los Angeles Department of Public Works website. These motions are **DENIED as moot.**

For the reasons discussed below, having fully considered the record in the case, the arguments of counsel, and being fully advised, I find that Complainant has not demonstrated by a preponderance of the evidence that Respondent is required to obtain an NPDES Permit pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p). Complainant has, therefore, failed to establish a threshold element of jurisdiction. Accordingly, I find that Respondent is not liable for the violations alleged in the Complaint.

II. FACTUAL BACKGROUND

Respondent, San Pedro Forklift, operates a facility located at 2418 E. Sepulveda in Long Beach, California ("Facility"). Ans. ¶ 2; C's Init. Ex. 4; C's Rebut. Ex. 1. Although no certified record from the State of California was introduced and no testimony was offered as to the corporate status of the Respondent, it was not disputed at hearing that the Respondent was incorporated in California on or about November 1987 and operated at a previous site until 1999. C's Init. Ex. 1; Ex. 3; Tr. 327-28. Renato Balov is the company's co-owner and Chief Operations Officer. Tr. 1908 at 6-7. His brother, Peter Balov, is the Chief Executive Officer. C's Init. Ex. 1. The site itself is owned by the Port of Los Angeles ("POLA" or "the Port"). Tr. 287 at 2. The property is subject to a lease executed between the Port and Respondent on or about January 13, 2000. C's Init. Ex. 37 at 11.

The Facility itself is shaped like a curved sail with the eastern boundary running north-south where the mast would be. C's Init. Ex. 12 at 4. A rail spur runs along that eastern edge and is paralleled by a covered loading dock; at each end of the loading dock are warehouses. *Id.* There are three other office out-buildings. Nearly the entire site consists of paved, impervious surface. *Id.* at 2, 5; R's Init. Ex. 30; Tr. 93 at 1-12. There are two storm inlets located adjacent to the southern boundary of the site. *Id.* at 20. The storm inlets divert water to the Port's drainage system, which discharges, approximately 800 feet west of the Facility, directly to the Dominguez Channel. Tr. 538 at 3-20; Tr. 554 at 9-13; Tr. 658 at 2-10; C's Init. Ex. 11 at 3, 7; C's Amd. Ex. 2. The Dominguez Channel, in turn, drains into Los Angeles Harbor and San Pedro Bay. Tr. 732-34; C's Init. Ex. 53 at Chp. 2 pg. 28.

Pursuant to a national priorities initiative for its Storm Water Enforcement Program issued by EPA in November 2004, EPA Region 9 identified ports as an area of focus for stormwater enforcement inspections starting in 2005. Tr. 65, 72-74; C's Amd. Ex. 7 at 13. As part of this inspection program, in 2007 EPA conducted a review of the tenants at the Port of Los Angeles and inspected 25 tenants that EPA believed were subject to stormwater regulations, including Respondent's Facility, and which showed no record of coverage under the State's general stormwater permit. Tr. 76-78. The selection process was based, in part, on information received from the Port and other external sources about the activities that occurred at each site, including any SIC Codes described in that information. Tr. 77-78, 187-89. From this preliminary information, Complainant determined that Respondent appeared to be a transportation facility. Tr. 78 at 6-7.

On May 17, 2007, at approximately 1:30 p.m., Amy Miller and Anne Murphy of the EPA, along with Kathryn Curtis of POLA and Chin Tao of the Los Angeles Water Protection Division, visited the Facility and conducted a stormwater inspection. Ans. ¶ 5; Tr. 88 at 6-12; C's Init. Ex. 14 at 1. At hearing, Ms. Miller testified that during the investigation she generally observed trucks and forklifts on the property, forklifts moving goods between the loading dock and trucks, and goods being stored in the main paved area. Tr. 93 at 5-12; Tr. 131 at 4-20. She also observed "cargo [. . .] being staged in the yard and then [. . .] placed into trucks or containers on chassis and being moved in and out of the facility." Tr. 139 at 3-7.

Following the May 2007 inspection, Complainant issued a Findings of Violation and Order for Compliance ("Compliance Order") to Respondent, directing it to come into compliance with the CWA. Tr. 152 at 10-17. The Compliance Order, dated November 9, 2007, directed Respondent to apply for a NPDES permit, develop and implement both a SWPPP and a Monitoring Plan, and to complete

interim control measures outlined in the Compliance Order. C's Init. Ex. 28. Specifically, Respondent was ordered to institute control measures that included:

a. Containment of runoff from vehicle washing;
b. Implementation of best management practices to contain liquid substances; and
c. Removal or cover and contain [sic] exposed batteries and debris near the pallet storage area in [sic] the North East side.

Id. at 5; Tr. 158-59. A copy of the May 2007 Inspection Report was enclosed with the Compliance Order.

In December 2007, Respondent filed an NOI with the State of California. The NOI was processed and Respondent obtained coverage under the General Permit on December 24, 2007. Tr. 161 at 1-15; C's Init. Ex. 4. Respondent subsequently submitted a SWPPP on February 8, 2008. Tr. 161-62. The SWPPP was signed by Renato Balov on January 23, 2008. C's Init. Ex. 12.

On August 18, 2009, Amy Miller returned to the Facility, along with Rick Sakow of the EPA, to conduct a second inspection. The purpose of the second inspection was, *inter alia*, to investigate the implementation of Best Management Practices (BMPs) as well as concerns raised by Respondent in its SWPPP regarding alleged commingling of stormwater runoff from other properties with stormwater runoff from the Facility. Tr. 163 at 5-22; 165 at 6-13. During the inspection, Ms. Miller observed that the filters identified in the SWPPP were not installed. Tr. 169 at 5-19). In addition, Respondent's representative, Gary Jerrell, was unable to produce sampling records as required by the SWPPP. Tr. 173-75. In the inspection report, Ms. Miller noted that Respondent was currently fumigating fruits and vegetables and 'trainloading' agricultural commodities. C's Init. Ex. 16. The report also notes the presence of "obsolete equipment, and tires and agricultural commodities stored in the yard." *Id.* at 6. *See also* Tr. 444 at 14-20.

Though there was substantial debate as to the extent, scope, and type of activities that occurred at the Facility, it is not disputed that the Respondent was primarily engaged in commodity transloading from over-the-road trailers into ocean containers for export and import, and fumigating products for import and export from 2004 through 2009.[2/] Tr. 194-95; Tr. 1915-18; Tr.

[2/] The May 2007 Inspection Report identified Respondent's Facility as a Marine Cargo Handling facility with the SIC 4491. C's Init. Ex. 14. The Facility's activity is described as "[o]peration & distribution from 'transloading' yard for recycled plastic materials transport by truck or (continued...)

1423-24; C's Init. Ex. 12 at 4; Ex. 14 at 2; Ex. 16 at 2; and Ex. 33 at 1. *See also* C's Rebut. Ex. 2.

III. STATUTORY AND REGULATORY BACKGROUND

The stated objective of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by eliminating the discharge of pollutants

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[2] (...continued)
rail." *Id.*; *see also* C's Init. Ex. 60. The first Compliance Order, dated November 9, 2007, states that Respondent's Facility "is primarily engaged in the distribution of recycled plastic materials transported by truck or rail, activities categorized under SIC 5093. C's Init. Ex. 28 at 3. In the cover letter for the first Compliance Order, Complainant identifies Respondent as a "scrap and waste materials handling facility . . . which fall[s] within Standard Industrial Classification number 5093." *Id.*

At hearing Complainant's witness, Ms. Miller, stated that the use of 5093 was "a clerical error." Tr. 157 at 12-15. On cross-examination, Ms. Miller acknowledged that baled plastic materials had been captured in a photograph and are the same type of materials contemplated by the description of a 5093 facility in the Compliance Order. Tr. 198-200. Nevertheless, Ms. Miller reiterated her contention that the presence of the 5093 language was a transcription error due to the fact that "[w]e were issuing many orders on November 9th." Tr. 201 at 9-11. She testified further that "it was supposed to be marine cargo handling [SIC 4491]." Tr. 201 at 14-15.

In the second Compliance Order, dated September 25, 2009, Complainant identified Respondent as "primarily engaged in Trucking, except Local, activities classified under SIC 4213." C's Init. Ex. 29 at 3. In its subsequent application for coverage under the General Permit, Respondent self-identified under SIC 4213 ("Trucking, except local"). C's Rebut. Ex. 1. This SIC is repeated in Respondent's 2007-2008 Annual Report submitted to the Control Board. C's Init. Ex. 5. SIC 4213 then appears in the Complaint. Compl. ¶ 5. At hearing, Ms. Miller testified that she was not concerned by the change from SIC 4491 to 4213 because "[b]oth of those SIC Codes are within the transportation sector and both have . . . [v]ehicle equipment maintenance and washing." Tr. 148 at 8-17. On cross-examination she testified that she agreed with Respondent's use of the 4213 identification code. Tr. 203 at 13-15.

Inasmuch as SIC 4491 and 4213 are both listed in 40 C.F.R. § 122.26(b)(14)(viii) as transportation facilities, they are both subject to the same narrative standard set forth therein. Importantly, the Complaint, Respondent's Notice of Intent, and Respondent's Annual Reports all identify the Facility as SIC 4213, and at hearing Complainant consistently pursued SIC 4213. This is consistent with the EPA's instructions in the preamble to the Final Rule that "[i]ndustries will need to assess for themselves whether they are covered by a listed SIC and submit an application accordingly." 55 Fed. Reg. 48,010. Therefore, I assume without deciding that Respondent's Facility is properly classified as SIC 4213.

into navigable waters. 33 U.S.C. § 1251(a). To achieve that goal, Congress included in the CWA Sections 301(a) and 402(a) and (b), which prohibit the discharge of any pollutant from any point source into waters of the United States unless done in compliance with the National Pollutant Discharge Elimination System ("NPDES") established by Section 402. 33 U.S.C. §§ 1311(a), 1342(a) and (b); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1145 (9th Cir. 2000).

Finding that pollutants in the previously, generally unregulated area of municipal and industrial stormwater discharges were causing deterioration in rivers and streams, Congress passed the Water Quality Act of 1987 ("WQA"), which amended the CWA to, *inter alia*, clearly and specifically extend the Act's permit requirements to industrial stormwater discharges by adding Section 402(p). *See*, 133 Cong. Rec. S733-02 (1987) (Remarks of Sen. Burdick of North Dakota, *et al.*, in support of proposed WQA noting that it addresses on-going "serious water pollution problems" including the 30% of rivers still not meeting water quality standards due to pollution and that stormwater runoff containing toxic and conventional pollutants is the cause of half the remaining water quality problems); Section 405 of Pub. L. No. 100-4, 101 Stat. 7 (Feb. 4, 1987) (codified as 33 U.S.C. § 1342(p)).

Section 402(p) of the CWA is specifically written in the negative, providing that prior to October 1, 1994, "discharges composed entirely of stormwater" "shall not require a permit" except for, *inter alia*, a "discharge associated with industrial activity." 33 U.S.C. § 1342(p)(1). The affirmative statutory requirement that a permit be obtained for the explicitly enumerated types of stormwater discharges set forth in Section 402(p) is contained in Section 301's general prohibition on the discharge of any pollutant *except* in compliance with, *inter alia*, the NPDES permit system. *See also* 33 U.S.C. § 1342(p)(3)(A) (requiring permits for "discharges associated with industrial activity" to meet all applicable provisions of Section 402 and 301).[3/] On January 4, 1989, EPA published a rule promulgating the language found in Section 402(p)(1) and (2) of the amended CWA at 40 C.F.R. § 122.26(a)(1).

On November 16, 1990, pursuant to its authority under the CWA, EPA promulgated regulations partially implementing Section

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[3/] This general prohibition, however, applies to stormwater discharges only to the extent that Section 402(p) specifically identifies them. *See, e.g.*, 33 U.S.C. § 1342(p)(2)(B) (discharges "associated with industrial activity" are specifically listed as requiring NPDES permits). Moreover, the Act directs the Administrator to establish regulations "setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C)," 33 U.S.C. § 1342(p)(4)(A), thus limiting the scope of the subsequent regulations to, *inter alia*, discharges associated with industrial activity.

402(p)'s permit requirements for stormwater discharges associated with industrial activity. *See* National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified at 40 C.F.R. parts 122, 123, and 124) ("Final Rule"). In the preamble to the Final Rule, EPA stated that it was "in the process of developing a preliminary strategy for permitting stormwater discharges associated with industrial activity." *Id.* at 48,002. Under the Final Rule, dischargers of stormwater associated with industrial activity were required to apply for a NPDES permit in one of three ways: by individual permit application, through the group application process, or by submitting a notice of intent to be covered by a general permit. *Id.* at 48,006. The Final Rule stated further that "[s]torm water discharges [sic] associated with the industrial activities identified under § 122.26(b)(14) of today's rule may avail themselves of general permits that EPA intends to propose and promulgate in the near future." *Id.*

In its Final Rule, EPA defined the scope of the phrase "discharges associated with industrial activity" in part 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 . . . ." *Id.* at 48,007. The legislative history of the WQA indicates that Congress intended the term to capture discharges "directly related to manufacturing, processing or raw materials storage areas at an industrial plant." 132 Cong. Rec. H10932, H10936 (daily ed. Oct. 15, 1986); 133 Cong. Rec. H176 (daily ed. Jan. 8, 1987).

To give more structure and detail to this general description, EPA incorporated a combination of SIC Codes and narrative standards to create a specific list of the types of facilities that would be covered by the Final Rule. These categories were enumerated at 40 C.F.R. § 122.26(b)(14)(i)-(xi).[4/] However, the composition of the definition in each paragraph varies depending on the category of facility. The paragraph relevant to the case at hand is paragraph (viii), which extends coverage to:

[4/] The facilities identified in Section 122.26(b)(14)(i)-(xi) are "considered to be engaging in 'industrial activity'" and are required to seek NPDES coverage through one of the avenues identified in the Final Rule (individual permit, group permit, or Notice of Intent for general permit). 40 C.F.R. § 122.26(b)(14). In the subsequent 1995 Report to Congress, EPA noted that "[o]nly those facilities described in the 11 categories of the definition [section 122.26(b)(14)(i)-(xi)] that have point source discharges of storm water are required to apply for storm water permit coverage under Phase I of the program." Report to Congress, at 4-8.

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

40 C.F.R. § 122.26(b)(14)(viii) ("Paragraph (viii)"). This hybrid category requires the application of a two-step process to determine whether a particular facility meets the definition of having "discharges associated with industrial activity."

As the language of Paragraph (viii) indicates, to be a covered "transportation facility" an entity must first have an appropriate SIC Code (40xx-45xx or 5171, except 4221-25). For this and all other categories that refer to the SIC system, the Final Rule states that "[i]ndustries will need to assess for themselves whether they are covered by a listed SIC and submit an application accordingly." Final Rule at 48,010. EPA extended this requirement to Federal, State, and municipal facilities, which, while generally lacking SIC Codes, would still be required to apply for a NPDES permit "if they are engaged in an industrial activity that is described under § 122.26(b)(14)." *Id.*

The next step in the process requires that facilities falling within the listed SIC categories must also "have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations" before the regulation requires the entity to seek a NPDES permit as a regulated "transportation facility." While Paragraph (viii) does include a non-exhaustive list of activities that might constitute "vehicle maintenance," it does not define "vehicle maintenance shops," "equipment cleaning operations" or "airport deicing operations." 40 C.F.R. § 122.26(b)(14)(viii).[5/] Nor do the parties offer any case law construing these phrases.

[5/] EPA stated in the preamble that it intends "maintenance facilities" to be covered by the Final Rule, but specifically notes that "such areas are only regulated in the context of those facilities enumerated in the definition at § 122.26(b)(14), and not similar areas of retail or commercial facilities." Final Rule at 48,009. This statement bolsters the proposition that the narrative language in section 122.26(b)(14) sets the jurisdictional parameters for stormwater discharges associated with industrial activity. Facilities that fall outside those parameters would not be regulated, as contemplated by Section 402(p). 33 U.S.C. § 1342(p).

Once these threshold jurisdictional elements have been met, the facility is considered a discharger of stormwater associated with industrial activity and is required to apply for an individual permit or seek coverage under a general permit. 40 C.F.R. § 122.26(c)(1). An individual permit is one tailored to a single, specific facility and its particular discharges. General permits, issued by EPA or authorized state programs, establish uniform permit conditions for broad categories of discharges by similarly situated facilities. 40 C.F.R. § 122.28(b)(2)(I). Once a general permit is issued by a permitting authority, any potential discharger that believes it meets the general permit criteria can submit a "Notice of Intent" ("NOI") to the permitting authority requesting coverage under the general permit and promising to comply with the conditions therein. 40 C.F.R. § 122.28(b)(2)(I). The permitting authority can then grant coverage under the general permit or require the facility to apply for an individual permit. 40 C.F.R. § 122.28(b).

On May 14, 1973, California became the first state to be approved by EPA to administer the NPDES program. Discharges of Pollutants to Navigable Waters, 39 Fed. Reg. 26,061 (July 16, 1974). It has been authorized by EPA to issue general NPDES permits since September 22, 1989. Approval of California's Revisions to the State NPDES Program, 54 Fed. Reg. 40,664, 40,665 (Oct. 3, 1989). On April 17, 1997, pursuant to its delegated authority, California's State Water Resources Control Board ("State Board") issued General Permit No. CAS000001/Water Quality Order No. 97-03-DWQ entitled "Waste Discharge Requirements (WDRS) For Discharges of Storm Water Associated With Industrial Activities Excluding Construction Activities" (again, the "General Permit" or "CGP").[6/]

The CGP states, in relevant part, "[t]his General Permit shall regulate storm water discharges and authorized non-storm water discharges from specific categories of industrial facilities identified in Attachment 1 . . . ." GCP at 1. Attachment 1, in turn, lists the same ten categories of facilities found in 40 C.F.R. § 122.26(b)(14)(i)-(x). With respect to "transportation facilities" the General Permit states:

> "Industrial facilities include Federal, State, municipally owned, and private facilities from the following categories:

* * * *

[6/] The CGP is available online at: http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/induspmt.pdf. The State Board issued a separate General Construction Storm Water Permit on August 19, 1999 (Water Quality Order 99-08-DWQ).

> 8. Transportation Facilities: SICs 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication) or other operations identified herein that [sic] are associated with industrial activity."

CGP, Attachment 1 at 1-2.[7]

IV. BURDENS OF PROOF

The Rules of Practice governing this proceeding state that "the complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R § 22.24(a). The standard of proof under the Rules of Practice is a preponderance of the evidence. 40 C.F.R. § 22.24(b). Therefore, in this instance, Complainant has the burden of demonstrating by a preponderance of the evidence the Respondent's liability as to Count 1, 2, and 3 of the Complaint and the appropriateness of its proposed penalty with respect to each count.

Furthermore, Section 402(p) of the CWA sets forth a general exemption for discharges composed entirely of stormwater and specifically delineates certain exceptions to that general exemption. The structure of this Section leaves no doubt that Complainant also bears the burden of proving that Respondent's discharges, if any, were "associated with industrial activity" as defined in the regulations. It does not fall to the Respondent to prove an exception. 33 U.S.C. § 1342(p).

V. DISCUSSION

The three counts identified in the Complaint are properly conceptualized as interdependent to some extent. Count 1 alleges that Respondent discharged pollutants in violation of the Clean Water Act. Compl. ¶¶ 29-36. These charges are premised on the allegations that Respondent is a discharger associated with

[7] Although the final phrase of the CGP's Paragraph (viii) equivalent is worded slightly differently than 40 C.F.R. § 122.26(b)(14)(viii) (and is, in fact, a sentence fragment), the phrase "[o]nly those portions of the facility involved in . . ." is a restrictive condition limiting the areas that are regulated and suggests that Paragraph (viii) should be applied narrowly. Correspondingly, this phrase does not expand the reach of the CGP beyond the first sentence (identical to Paragraph (viii)), which requires the presence of a vehicle maintenance shop, equipment cleaning operations, or airport de-icing operations before the CGP is triggered.

industrial activity as defined by 40 C.F.R. § 122.26(b)(14), specifically a facility engaged in the trucking of recycled materials categorized under SIC Code 4213. Compl. ¶¶ 4-5. If Respondent were found liable for Count 1, it then becomes potentially liable for failing to submit an NOI for coverage under the General Permit as alleged in Count 2. Compl. ¶¶ 38-39.[8/] If the alleged actual or potential discharges composed entirely of stormwater were not proven to be "associated with industrial activity," then they do not violate Section 402(p) in the first instance, and there would be no legal requirement to submit an NOI for General Permit coverage.[9/] 33 U.S.C. § 1342(p); Final Rule at 48,006. By extension, Respondent's liability for Count 3 is premised on the allegation that it was required, in the first place, to obtain coverage under the General Permit and comply with its terms. *See* Compl. ¶¶ 41-48. Stated another way: the SWPPP is a requirement set forth in the General Permit, coverage under which is required only if the Respondent was a discharger of stormwater "associated with industrial activity" as that phrase is defined by the regulations. *See* 40 C.F.R. § 122.21(a)(1) (the duty to apply for a NPDES permit applies only to "any person who discharges or proposes to discharge pollutants" or certain other owners/operators not relevant here); 40 C.F.R. § 122.26(b)(14) (explicitly defining the phrase "storm water discharge associated with industrial activity"). Therefore, liability under Count 1 must first be found before considering Counts 2 and 3.

In considering whether Respondent was a discharger associated with industrial activity, it is critical to determine (1) what activities meet the definition of "associated with industrial activity" for a facility identified by SIC Code 4213, and (2) whether the evidence establishes that Respondent was engaged in those activities during the relevant time period.

[8/] There is no dispute that Respondent did not apply for an individual or group NPDES permit, one of the alternative methods of bringing discharges associated with industrial activity into compliance with the CWA. Therefore, if Respondent were found to be a discharger associated with industrial activity, it would have been required to file an NOI to be covered under the General Permit.

[9/] There is a difference of opinion regarding the propriety of requiring an entity to apply for a permit when, prior to an actual discharge, the entity has engaged in activity that creates the potential for discharge. *See, e.g.*, *Service Oil, Inc. v. U.S. Envtl. Prot. Agency*, 590 F.3d 545 (8th Cir. 2009). However, I need not reach this issue because jurisdiction is decided based on whether Respondent's alleged discharges, actual or otherwise, are sufficiently "associated with industrial activity" to bring the Facility within the purview of the stormwater regulations cited in the Complaint.

A. Activities Establishing Jurisdiction Under Stormwater Regulations

As previously noted, the regulations governing stormwater dischargers set forth specific requirements that must be met before an entity's discharges can be "associated with industrial activity" and thereby subject to NPDES permitting requirements. With respect to entities categorized by SIC Code 4213, those specific requirements are found in Paragraph (viii). 40 C.F.R. § 122.26(b)(14)(viii). Thus, if a facility falling within a SIC Code listed in Paragraph (viii) *also* has "vehicle maintenance shops, equipment cleaning operations, or airport deicing operations," all stormwater discharges from the areas of the facility engaged in those enumerated activities are considered "discharges of storm water associated with industrial activity" and the discharging entity must seek permit coverage. *Id.*; *see also* C's Post-Hrg. Br. at 12.

The consideration of the phrases "vehicle maintenance shops" and "equipment cleaning operations" are critical to evaluating whether a particular facility is subject to the stormwater permitting requirements.[10/] In its post-hearing brief, Complainant asserts that Respondent "had vehicle maintenance shop and equipment washing operations at the Facility" using the complete regulatory phrases. C's Post-Hrg. Br. at 13. However, in its post-hearing reply, Complainant argues that "the regulation is intended to include those *areas* of the facility where maintenance activities occur, regardless of whether these is a brick-and-mortar repair shop." C's Post-Hrg. Reply at 3.

At hearing Complainant's lead witness, Ms. Amy Miller, testified on cross-examination that she believed Paragraph (viii) contemplates something broader than a brick-and-mortar shop.

> Q: Okay. So when [the] SIC Code talks about maintenance shops, and the two words, maintenance and shops are used in conjunction, we're talking about the kind of place you just described where you take your car to get fixed, isn't that what's contemplated here?
>
> A: No.
>
> Q: What is contemplated here?

[10/] The importance of the specificity of these phrases is bolstered by the fact that the broader phrase "material handling facilities," found in the draft rule, was specifically deleted from the promulgated version of the Final Rule. Final Rule at 48,013. What remains, consequently, is the result of the apparent choice by the Agency to limit the narrative portion of the standard in Paragraph (viii).

> A: *I think it's much broader than that*. There's a range of maintenance activities that can happen. For example, sometimes when you're at home you may want to change your oil. There could be like minor jobs that are done and I've seen this in other transloading facilities where maybe minor jobs of changing oil, replacing a battery, replacing a tire happen at the facility and then maybe major work happens at a place that has expertise in major work.

Tr. 250-51 (emphasis added).[11]

Through Ms. Miller, Complainant offered testimony ostensibly aimed at determining the legal framework pursuant to which entities under certain SIC Codes would be subject to the stormwater regulations. Tr. 139-40. Ms. Miller relied on Exhibits 25 and 61 from Complainant's Initial PHE to demonstrate the jurisdictional contours of those regulations. Tr. 140 at 15-18. Exhibits 25 and 61 are both entitled "Industrial Stormwater Fact Sheet Series" and are published by the EPA's Office of Water. Exhibit 25 covers Sector Q "Water Transportation Facilities with Vehicle Maintenance Shops and/or Equipment Cleaning Operations," which corresponds to certain SIC Codes including 4491 (Marine Cargo Handling). C's Init. Ex. 25. Exhibit 61 covers Sector P "Motor Freight Transportation Facilities, Passenger Transportation Facilities, Petroleum Bulk Oil Stations and Terminals, Rail Transportation Facilities, and United States Postal Service Transportation Facilities," which covers certain SIC Codes including 4213. C's Init. Ex. 61. Both are dated December 2006 and have sequential publication numbers.

With respect to Exhibit 25 (relevant to SIC Code 4491), Ms.

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[11] In the final hours of the hearing, during its rebuttal, Complainant also attempted to elicit direct testimony from Mr. Eugene Bromley intending to offer "evidence concerning [the definition in Paragraph (viii)] that maintenance activities do not have to be taking place in a shop to make someone subject to the regs in that 40 Series." Tr. 2341-42. The exclusion of this testimony was based, in part, on the fact that the proposed testimony appeared to be aimed at a question of law, answers to which remain the province of the Administrative Law Judge, with due consideration given to arguments of counsel. In addition, in sustaining the objection from Respondent, Tr. 2339 at 6-11, it was noted that rebuttal is not intended to be the vehicle for the complainant to make its *prima facie* case.

Moreover, based on the initial questions asked by EPA counsel and the stated direction of the testimony, it was clear that Mr. Bromley would be called upon to testify, in part, as a fact witness regarding his personal knowledge of the development of the stormwater regulations in 1988 and EPA's organizational intent in drafting those provisions. Tr. 2334-38. Such testimony is deemed irrelevant and of little probative value.

Miller testified as follows:

> Q: All right. Looking then at Exhibit 25, could you tell me some of the types of activities listed as taking place at marine transport facilities with vehicle maintenance?
>
> A: Yes. If you go to page two, table one, it lists out some common activities. They include things like engine maintenance and repair, material handling, transfer storage disposal.
>
> Q: And did you observe any of these activities you just mentioned in your May 2007 inspection?
>
> A: Yes.
>
> Q: Could you tell me specifically what they were?

Tr. 140-41.

With respect to Exhibit 61 (relevant to SIC Code 4213), Ms. Miller testified as follows:

> Q: All right, and could you tell me, my other line of questioning, some of the types of activities listed as taking place at motor freight transportation facilities with vehicle maintenance areas?
>
> A: Okay, if you go to page two and three of this fact [sheet]. It has a table, Table 1, which has common activities and they include fueling, vehicle and equipment storage and parking and liquid storage in above-ground storage containers.
>
> . . .
> Q: During your May 2007 inspection, did you observe any materials that suggested fueling was taking place at San Pedro Forklift?
>
> A: Yes.
>
> Q: And what did you see?

Tr. 144-47.

In explaining why she believed that changing from SIC Code 4491 to 4213 was not of concern, Ms. Miller summed up her testimony on this point stating:

> A: Both of these SIC Codes are within the transportation sector and both have vehicle equipment and maintenance, excuse me, wait a minute. Vehicle

equipment maintenance and washing.

Tr. 148 at 13-17. Repeatedly, both witness and counsel for Complainant referred back to the narrative standard set forth in Paragraph (viii), but both consistently truncated their references to some form of "vehicle maintenance" and "equipment washing." This language ignores the presence of the words "shop" and "operations" at the end of those respective phrases. Moreover, Complainant appears to rely solely on the Fact Sheet Series language as the basis for determining jurisdiction over Respondent's Facility.[12/]

However, this ignores the "ancient and sound rule of construction that each word in a statute should, if possible, be

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[12/] Both Exhibits 25 and 61 state that the information they contain was compiled primarily from EPA's past and current Multi-Sector General Permits. C's Init. Ex. 25 at 11; Ex. 61 at 11. Complainant's Exhibit 55, the EPA Multi-Sector General Permit for Storm Water Discharges Associated with Industrial Activity, was admitted pursuant to the Joint Stipulations of the parties. C's Init Ex. 55 ("MSGP 2008"). However, Exhibit 55 only became effective on September 29, 2008, a date beyond the alleged period of violation according to Count 1 of the Complaint. *See* Final National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges From Industrial Activities, 73 Fed. Reg. 56,572 (Sept. 29, 2008); Compl. ¶ 25. Instead, I could take administrative notice of the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, issued on October 30, 2000 ("MSGP 2000"), and in effect at the start of the alleged violation period. Final Reissuance of NPDES Storm Water Multi-Sector General Permit for Industrial Activities, 65 Fed. Reg. 64,746 (Oct. 30, 2000).

However, like the MSGP 2008, the MSGP 2000, by its own terms, is limited to certain geographic areas and states that are not covered by a delegated NPDES program, making it inapplicable to any California entity or jurisdiction save Indian Lands located therein. 65 Fed. Reg. at 64,749. Even if either MSGP were applicable, it could not enlarge or alter the scope of the regulations it is intended to explain. Complainant's argument that the MSGP expands the reach of the stormwater regulations and covers a broader list of facilities is rejected. *See* C's Post-Hrg. Br. at 5 (As a guidance document, the Fact Sheet for the General Permit cited by Complainant carries even less force than the CGP itself). A regulatory entity must still satisfy the initial threshold stated in the regulation at 40 C.F.R. § 122.26(b)(14). In theory, a general permit can be tailored to meet the needs of the particular region, but it must do so within the bounds of the Act and its promulgated regulations. While the activities listed in the MSGP may be generic activities commonly associated with industrial activities, proof of them is insufficient on its own to satisfy the requirements of a vehicle maintenance *shop* or equipment cleaning *operations*. *See* MSGP 2008, 73 Fed. Reg. at 56,574 ("EPA defined the term 'stormwater discharge associated with industrial activity' in a *comprehensive manner* to cover a wide variety of facilities. See 40 CFR 122.26(b)(14). EPA is issuing the MSGP under *this statutory and regulatory authority*") (emphasis added)).

given effect" and "[a]n interpretation that needlessly renders some words superfluous is suspect." *Crandon v. U.S.*, 494 U.S. 152, 171 (1990) (Scalia, J., concurring); *see also United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (declining to adopt a construction that would violate the "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect."). This rule of statutory construction applies with equal force to duly promulgated regulations. *See Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 823-24 (8th Cir. 2009); *Sekula v. F.D.I.C.*, 39 F.3d 448, 454 (3d Cir. 1994).

In applying this rule to the regulation at hand, it becomes apparent that the phrases "vehicle maintenance shops" and "equipment washing operations" must be read in their entirety when determining which certain activities establish jurisdiction under 40 C.F.R. § 122.26(b)(14). Neither phrase is defined in the regulations or in the CWA itself. A court's first task, when a statutory or regulatory phrase is not defined, is to determine the "plain meaning" of the language. *See, e.g., CBS Inc., v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001); *Harris v. Sullivan*, 968 F.2d 263, 265 (2d Cir. 1992) (Absent a definition, the court considers the ordinary, common-sense meaning of the words).

B. "Vehicle Maintenance Shops"

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 or repairing of goods or machinery." *Webster's Third New International Dictionary* 2101 (2002).[13/] Given the inclusion of this word, 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" that narrows the scope of the regulatory language. Absent the word "shops" the phrase "vehicle maintenance" would have a significantly broader reach.[14/]

[13/] Common synonyms of the word "shop" include a workshop, studio, atelier, factory, plant, works, or mill. *The Random House Thesaurus College Edition* 645 (1987).

[14/] In the Final Rule, 55 Fed. Reg. 47,990, the Agency specifically notes that "maintenance facilities" which are evidently not excluded "are only regulated in the context of those facilities enumerated in the definition at § 122.26(b)(14) . . ." Final Rule at 48,009. This supports the proposition that the narrative standards in 40 C.F.R. § 122.26(b)(14) set the defining parameters for purposes of jurisdiction.

1. Direct Evidence Offered by Complainant

In her testimony and through her affidavits and inspection reports, Ms. Amy Miller stated that she observed during the 2007 inspection, *inter alia*, 55-gallon metal drums (one with a pump on the top), open metal and plastic containers (some of which contained what she believed to be "an oily substance" or "oil" or "used oil") (Tr. 95 at 14-16; 96 at 2-4; 107 at 1-11; 110-11; 299 at 6 and 20; 300 at 2-4), a single battery on a wood pallet (Tr. 115 at 1-3; 132 at 3-4; 349 at 13-19), parked trucks (Tr. 123 at 2-3), stacks of baled plastic (Tr. 122 at 3-18), unspecified painting equipment (Tr. 115 at 4-5), metal equipment (Tr. 114 at 9-16; 116 at 1-8), metal debris (Tr. 114 at 18-22), and uncovered trash, debris, sediment, and pavement staining in various areas of the Facility (Tr. 99-100; 115 at 12-16; 117 at 11-17; 122 at 18-22; 123 at 3-6). C's Init. Ex. 14; C's Amd. Ex. 1; C's Rebut. Ex. 3. She also testified that she smelled what she described as petroleum, used oil (Tr. 107 at 1-13), a "petro carbon kind of smell" (Tr. 111 at 11-14), or a "petrochemical type odor" (Tr. 205 at 1-2) emanating from the 55-gallon drum located next to the north warehouse (depicted in Photograph 7 from C's Init. Ex. 14). C's Rebut. Ex. 3 at 1-2. During the 2009 inspection, Ms. Miller also testified that she observed "a pile of tires" along the perimeter fence. Tr. 444 at 16-20; C's Init. Ex. 16 at 2.

Ms. Miller further testified that:

A: I observed evidence of engine maintenance and repair from either equipment or from vehicles as I described from my previous photographs. I also did observe that material was being handled and transferred. I observed some waste material including paint solids and trash associated with the storage of goods.

Tr. 141 at 15-22.

This testimony was followed by:

> A: I observed a container with a spout on the top of it and also a 55-gallon drum with a pump on the top. These are indications that it's used to pour liquid. Based on my observations, I believed that it was some sort of lubrication or type of liquid used to fuel either some sort of equipment or vehicle.

Tr. 146-47.

This testimony was supported by large color photographs attached to the May 2007 Inspection Report. C's Init. Ex. 14. Specifically, Photo 3 depicts a single, car-sized, black battery, with a gray top, on a wood pallet along with some pavement staining and what appear to be used painting implements. Photo 6 depicts an unmarked, blue, 55-gallon barrel on a wooden pallet adjacent to a warehouse wall. Red fuel containers and yellow metal canisters are placed next to the blue barrel. There is some pavement staining around the pallet. Photo 7 depicts another 55-gallon drum on a wooden pallet. The color of the barrel is obscured by a black substance, but some portion retains the original blue color that matches the color of the barrel in Photo 6. Additional metal canisters as well as some plastic buckets are seen in Photo 7 next to the barrel on another wooden pallet. There is significant staining on the warehouse wall behind the barrel as well as on the ground, emanating from the barrel area. Color photographs attached to the 2009 Inspection Report also indicated the presence of over two dozen large tires stacked by the perimeter fence. C's Init. Ex. 16 (IMGP0014).

The Respondent's SWPPP was also admitted into evidence as Complainant's Exhibit 12 from the Initial Prehearing Exchange. Although this document is dated January 23, 2008, it offers the only comprehensive statement by Respondent about its activities.[15/] In that document, Respondent acknowledged the presence of certain sources of "potential pollutants." C's Init. Ex. 12 at 6. Specifically, the SWPPP identifies the following relevant areas of concern:

> Trucks, Trailers and Containers are parked in the extended areas along the facility's western and southern perimeters, although San Pedro Forklift, Inc. maintains ownership of only one truck on site. Pollutants from the Trucks, Trailers and Containers, including fluid leaks, dirt on the outside surfaces, and any subsequent tracking are the potential pollutant sources from the Truck/Trailer/Container Parking areas.
>
> Operational Equipment refers to our forklifts, yard goats[16/] (UTRs), truck, and other machinery and equipment necessary for operation. The primary concern from Operational Equipment is tracking to

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[15/] *See infra* p. 33 and note 22 for discussion of the reliance on the SWPPP.

[16/] During cross-examination, Respondent's expert witness, Mr. Terry Balog, explained that a yard goat is akin to a smaller big rig or truck commonly used in ports to move things from one site to another or for unloading cargo. Tr. 1881 at 10-21.

> exposed areas of the facility and poorly maintained equipment.

C's Init. Ex. 12 at 6-7. Page eight (8) of the SWPPP contains the following information in table form:

> The table below shows the significant materials that we store on property. These materials are necessary for our daily operations. The amount of the material (maximum) and the turnover time are also listed.

Material	Amount and Turnover
Diesel Fuel	Approximately 55 gallons six times per year
Engine Oil	Approximately 55 gallons twice per year
Hydraulic Fluid	Approximately 30 liters twice per year
Transmission Fluid	Approximately 20 liters per year
Coolant	Approximately 20 liters per year
Bromide	Approximately 5-10 liters five times per year
Propane	Approximately 120 gallons compressed

Id. at 8. At hearing, however, Complainant offered no direct evidence about how these materials were used at the Facility.

Counsel for Respondent spent significant time on cross-examination attempting to discredit Ms. Miller's assertion that the 55-gallon barrels contained a petroleum substance. *See* Tr. 204-213. However, by letter to Complainant from Respondent's Co-Counsel, dated February 7, 2008, Respondent appears to admit that the blue, 55-gallon drums depicted in Photo 6 of the Inspection Report are, in fact, diesel fuel drums that were subsequently moved off the loading dock area into a trailer and placed on a spill pallet in an effort to comply with EPA's Compliance Order. *See* C's Init. Ex. 35.[17/] Nevertheless, on

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[17/] In its SWPPP, Respondent states that it uses approximately 330 gallons of diesel fuel annually. C's Init. Ex. 12 at 8. In its Post-Hearing Brief, Complainant argues that Respondent's testimony, though Mr. Renato Balov, inconsistently attributes the diesel fuel solely to use in the backup generator during power outages while later admitting that power outages between 2004 and 2007 were infrequent, brief, and never (continued...)

cross-examination, Ms. Miller admitted that she did not know whether the forklifts were maintained on site. Tr. 245 at 14-18.

During cross-examination regarding the presence of the battery, Ms. Miller testified as follows:

> Q: Let me show you photograph three, a battery and a pallet. How is that indicative of on-going maintenance activities at this premises?
>
> A: Well, to me, somebody probably took out the battery and placed it there.
>
> Q: Well, that's a good assessment. But how is that considered maintenance of these trucks, on a regular, on-going basis?
>
> A: Well, based on my observations, it appeared that a lot of the stuff in this back area was scrap metal, stuff that was not being used, and this battery was back there. And it appeared that it was no longer being used and when somebody is maintaining a vehicle, they'll remove it and if they don't have a place, they'll just put it down.

Tr. 246-47. She also testified that she did not know from which vehicle or equipment that battery had been taken. Tr. 244 at 18-22.

Ms. Miller's testimony on this point was credible and, combined with the photograph, demonstrates that a battery was present. However, the testimony also serves to illustrate the central problem: she did not offer any persuasive evidence as to regular, ongoing maintenance activities that, while not strictly required, would be consonant with having a "vehicle maintenance shop" on site.

[17/] (...continued)
occurred during fumigation events. C's Post-Hrg. Br. at 20 citing Tr. 2156-57. From this, Complainant concludes that the diesel fuel must have been used as part of a regular fueling operation for the yard goats during cargo handling operations at the Facility. *Id.* I note that Complainant bears the burden of proof in this matter. Given that no testimony was offered to prove that such fueling activities occurred, let alone whether they rose to the level of regularized maintenance; even assuming *arguendo* that the 330 gallons of diesel were used exclusively for fueling (an unlikely proposition) and that fueling alone constitutes "maintenance," the evidence presented on this point is unpersuasive. Even occasional fueling or engine fluid topping off does not constitute a "vehicle maintenance shop."

2. Evidence Elicited from Respondent's Witnesses

Two of Respondent's witnesses offered relevant factual testimony related to vehicle maintenance.[18/] Mr. Terry Balog, testifying as both a fact and expert witness, was the technical professional retained by Respondent to prepare and implement the SWPPP. Mr. Renato Balov testified as the principal of Respondent San Pedro Forklift.

On cross-examination, Mr. Balog was asked about the contents of the SWPPP that he prepared and that Mr. Balov, the principal, signed. *See* C's Init. Ex. 12. The SWPPP states that Respondent operates a truck, yard goats, and forklifts on site and that they are maintained, also on site, by an outside company. *Id.* at 18. Mr. Balog testified that while he did not observe any outside company coming to the Facility and maintaining the operational equipment, the forklift maintenance "more than likely would be done on-site." Tr. 1887 at 13-17. When asked about the specific materials Respondent included in the SWPPP, Mr. Balog testified as follows:

> Q: Okay. What is the diesel fuel used for?
>
> A: I don't know.
>
> Q: You prepared this SWPPP. Right?
>
> A: Yes.
>
> Q: And you spent several hours and four site visits observing them during business hours and you interviewed the owners. Correct?
>
> A: Yes.
>
> Q: And it is your testimony here today that you don't know what the diesel fuel is for?
>
> A: For the relevance of the SWPPP, we are only concerned that it is there, not what it is used for.

[18/] Two of Respondent's expert witnesses, Mr. Anthony Severini and Mr. Mark Bulot, both opined about the applicability of the stormwater regulations to Respondent's activities based on their asserted expertise in stormwater regulations and a joint site visit in January 2011. Tr. 1413-14; 1401 at 15-18; 1549-53; 1585 at 18-21; 1649 at 15-19. However, with the exception of Mr. Bulot's recitation of the owners' statements regarding past practices (Tr. 1611-12), none of their testimony offered any independent *factual* evidence as to the Facility's activities during the relevant time period and, therefore, shed no light on the issue of whether Respondent had a "vehicle maintenance shop" or "equipment cleaning operations."

Q: Okay. What is engine oil used for?

A: Engines.

Q: Okay, fair enough. Hydraulic fluid?

A: Hydraulic fluid would have potentially been used in forklifts. Hydraulics typically with lifting mechanisms.

Q: Okay. Transmission fluid?

A: Transmissions.

Q: Okay. What kind of vehicles have transmissions at San Pedro Forklift?
[Objection overruled]

A: Since it [transmission fluid] is 20 [liters] speculating because again we are only concerned about the fact that they have it there [. . .] but 20 liters per year is a very small amount. So I would think that they probably had it there for personal use. I'm not even sure if a forklift takes transmission fluid.

Tr. 1876-79. Mr. Balog subsequently admitted, upon being directed to the language in the SWPPP, that these materials were "necessary for daily operations" at the Facility. Tr. 1879-80. Even assuming, *arguendo*, that these materials were in fact daily necessities, it does not follow that these materials necessarily were used as part of the ongoing operations of a vehicle maintenance shop.

In concluding that Respondent's Facility had a vehicle maintenance shop, Ms. Miller also relied upon her observations of the yard generally, testifying that "the two 55-gallon drums" and the "buckets [which] appeared to be something that was used to remove liquid" indicated to her that they were "used in some sort of maintenance activity." Tr. 249 at 3-10 (referring to Photos 6 and 7 from the May 2007 inspection report). Mr. Renato Balov testified that the 55-gallon barrel depicted in Photo 7 (obscured by a dark residue) was empty and had only recently been moved to the location seen in the photo in preparation for its removal. Tr. 1945 at 2-19. He further testified that it had been removed from the blue and white trailer, depicted in Photo 10, which he characterized as the "USDA trailer." Tr. 1946-47; 1930-31 (describing the blue and white trailer as the storage container for fumigation-related materials, including the steel rods depicted in photo 4 and the chemical fumigants required by United States Department of Agriculture ("USDA")). There was also some testimony that the activities that occurred after the storage container was opened came under the jurisdiction of the USDA. Tr. 1930-31.

With respect to the unmarked, blue 55-gallon barrel with the mechanical spout, Mr. Balov testified as follows:

> Q: Okay, thank you. Now, let me show you photo 6. What does photo 6 depict?
>
> A: A barrel with a pump.
>
> Q: What is inside that barrel?
>
> A: Because of the items next to it, I would probably say the hydraulic fluid.
>
> Q: Okay.
>
> A: You know, offhand, if I had to guess with my experience, I would say it was apple juice concentrate.
>
> Q: Why would apple juice concentrate be inside that barrel?
>
> A: Well because this was May 17th, I believe, --
>
> Q: Yes.
>
> A: – and that was our main export, Florida apple juice and orange juice concentrate which came in these 55-gallon drums that were blue. Not all of them had the dispense thing. And sometimes I would be left with excess ones. Also, there are no labels on here.
>
> Q: Would apple juice concentrate be shipped in a barrel of the type depicted there with a dispenser on top?
>
> A: That is what they ship it in. Not all of them came with that pump thing on top but that is what you ship the concentrate in.
>
> Q: So what we are looking at here in [Photo] 6 is typical, with certain exceptions, some don't have the dispense, is typical of the type of shipping container of apple juice concentrate.
>
> A: Of –
>
> MS. JACKSON: Objection. He is testifying for him.
>
> JUDGE GUNNING: I think the direct testimony, I don't know how much more clearly I can make it, to follow-up and –
>
> MR. FRANCESCHI: Yes, Your Honor.

JUDGE GUNNING: It is truly leading.

MR. FRANCESCHI: Let me ask another question.

BY MR. FRANCESCHI:
Q: From [what] point in time to what point in time would apple juice concentrate be shipped?

A: Typically we would start right at the beginning of spring maybe to mid-summer. It was a real sporadic program. It was just one Cuban guy sending it over to me to start his business.

Tr. 1998-2000. Notwithstanding Mr. Balov's assertion that the 55-gallon barrel depicted in Photo 6 contained apple juice concentrate from Florida, and ignoring the apparent inconsistency of that statement with prior testimony (Tr. at 2026-27) and assertions in Complainant's Ex. 35, Mr. Balov did testify that the yellow and red containers depicted in Photo 6 appeared to be hydraulic fluid containers and gas or fuel containers, respectively, though he did not know whether they actually contained anything. Tr. 2005 at 7-20. However, even assuming, *arguendo*, that these barrels and containers did in fact contain oil, hydraulic fluid, gas, or fuel, as argued by Complainant, this evidence does not establish the presence of a vehicle maintenance shop.

In testifying as to the conditions at the Facility, Ms. Miller attached some significance to the presence of "scrap metal" and "stuff that was not being used." Tr. 246-47. Mr. Balov testified that the metal items identified by Ms. Miller as scrap were structural supports for the fumigation tents. According to Mr. Balov's testimony, these tents were erected inside one of the warehouses or in the yard on slightly raised cement pads that are approved by USDA for fumigation. Tr. 1936 at 6-22. The fumigation itself, according to Mr. Balov, is usually performed under the supervision of USDA personnel on site. Tr. 1913 at 1-14. He further testified that the tents were constructed using tarpaulins fitted over a frame of metal rods. Tr. 1937 at 9-16; 2013-14. The base of the tent was sealed by the weight of sand-filled bags. Tr. 2015 at 15-22. Depending on the particular commodity to be fumigated, and the temperature of the incoming stock, the tents were erected at various times during the day or in the evening. Tr. 1961-62; 2105-07. It should be noted that, as with any inspection, only a "snapshot" of the Respondent's activities is captured here. For example, at the time of the May 2007 inspection, photos were taken that showed various metal rods, sandbags, and tarpaulins lying on the ground, but Mr. Balov testified that these indicated to him that there was going to be an evening fumigation, a proposition Complainant did not dispute. Tr. 1932 at 14-16; 2105-06. Nonetheless, Mr. Balov also testified that

there were regular daytime activities and the inspection report showed a full roll-off dumpster at midday. C's Init. PHE Ex. 14 at Photo 9. However, none of this establishes the presence of the requisite vehicle maintenance shop.

By contrast, the stacked tires, observed during the 2009 inspection, suggest a larger program of tire usage, removal, and storage, which (even when taken alone) lend some support to Complainant's conclusion that Respondent was conducting vehicle maintenance on a scale consistent with having a "vehicle maintenance shop." On direct, however, Mr. Balov testified that, contrary to Ms. Miller's speculation, the tires were used, not for vehicles, but to secure the tarpaulin covers during fumigation activities. Tr. 1970-72. Mr. Balov specifically stated that weighing down the fumigation covers "is in the APHIS USDA treatment manual. While they don't actually say tires, we found it is the safest way to do it. So it was approved by our local APHIS office." Tr. 1971 at 13-18. Mr. Balov asserted that this use of the tires is "a preventative measure so no wind should get underneath [the tarpaulins]." Tr. 2015-16. On cross-examination, Mr. Balov further testified that the tires were covered when stacked for storage to prevent water from getting in the wheel wells and subsequently getting the fumigated produce wet when placed on top of the fumigation tent. Tr. 2139 at 12-17. Complainant offered no other evidence to support the proposition that the tires were used or handled in the context of vehicle maintenance. While a pile of exposed tires may not meet industry-standard Best Management Practices, they do not, under these circumstances, establish a "vehicle maintenance shop."

3. Conclusion as to Vehicle Maintenance Shop

Taken together, the credible evidence offered by Ms. Miller, combined with the documentary evidence admitted at hearing, admissions by Respondent, and testimony by Mr. Renato Balov, support the conclusion that Respondent was conducting occasional activities that might properly be termed maintenance of vehicles and equipment. Nevertheless, the overall evidence adduced at hearing does not meet the definition of "vehicle maintenance shop." On cross-examination, Ms. Miller admitted that she "did not see anybody actually conducting any maintenance, but [she] did see indications of evidence of leftovers from maintenance activities." Tr. 351 at 15-18.

Complainant argues in its post-hearing briefs that Paragraph (viii) was intended to extend to areas of a facility where maintenance activities occur "regardless of whether there is a brick-and-mortar repair shop." Complainant argues that such a reading "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 [Paragraph (viii)]." C's Post-Hrg. Reply at 3 (citing 55 Fed. Reg. at 48,013) (emphasis in the Reply Brief). Complainant asserts that "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.* This assertion is not consistent with the language in the Final Rule. The latter phrase that Complainant quotes is not a statement of jurisdiction; rather it is a partial list of what might be construed as "vehicle maintenance." 55 Fed. Reg. at 48,013. The language in the preamble does not obviate the need for a "shop." Moreover, the reference to EPA's inclusion of "train tracks" is based on an implicit assessment that the type of activity contemplated in the comments rises to a level that warrants regulations. Specifically, the language in the Final Rule reads:

> Train yards where repairs are undertaken are associated with industrial activity. Train yards generally have trains which, in and of themselves, can be classified as heavy equipment. Trains, concentrated in train yards, are diesel fueled, lubricated, and repaired in volumes that connote industrial activity, rather than retail or commercial activity.

Final Rule at 48,013.

This language does not support Complainant's contention. The explanation in the Final Rule contemplates that trains brought to a yard for repair will be "concentrated" and will be "repaired in volumes that connote industrial activity." *Id.* This reference to volume is critical as it indicates EPA's focus on operationally relevant activities (i.e., the purpose of the train yard is to maintain and repair trains). By contrast, the purpose of Respondent's Facility is not to maintain and repair forklifts that are transported to and concentrated at the Facility. While it is conceivable that a 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 are not present in the record before me.

The record contains no evidence of a discrete structure used for the purpose of vehicle maintenance, nor was there sufficient evidence that Respondent was engaged in an industrial establishment for the purpose of maintaining or repairing vehicles.[19] *See* Tr. 242 at 9-13; 252 at 2-14. Rather,

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[19] On direct examination, Complainant's witness, Ms. Miller, testified that she considers a forklift to be a vehicle or a piece of equipment. Tr. 238-39. Counsel for Respondent argued that Complainant (continued...)

Complainant's conclusions were based on reasonable extrapolations from observations made during a site inspection which, through subsequent explanation by Respondent, turn out to be inaccurate. Therefore, jurisdiction under that prong of the regulation is not established.

C. "Equipment Cleaning Operations"

Because Paragraph (viii) of the regulation is phrased in the alternative, a facility with the SIC Code 4213 that lacked a vehicle maintenance shop would still be required to obtain NPDES permit coverage if it conducted "equipment cleaning operations." 40 C.F.R. § 122.26(b)(14)(viii). Therefore, if Complainant could demonstrate by a preponderance of the evidence that Respondent had conducted "equipment cleaning operations" during the relevant time period, there would be a sufficient factual basis for finding jurisdiction to consider liability under Count 1. In the instant proceedings, Respondent disputed Complainant's assertions that "cleaning" occurred and that such activities were "operations" within the meaning of the regulations.[20/]

The gerund "cleaning" is the present participle of the verb "clean" which is defined as:

> to 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.

Webster's Third New International Dictionary 419 (2002).

The noun "operations" is defined in its singular form as, *inter alia*, "a business transaction esp. when speculative . . . the whole process of planning for and operating a business or

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[19/] (...continued)
improperly classified Respondent's forklifts as "vehicles" for purposes of the first prong of Paragraph (viii). Tr. 1561 at 4-13. Neither party produced any persuasive evidence that forklifts are properly classified as either vehicles or equipment. However, even assuming, *arguendo*, that forklifts are vehicles, Respondent 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.

[20/] Respondent's SWPPP identifies its forklifts, yard goats, and truck as "equipment," thus suggesting that if Respondent engaged in regular washing operations for those items, then the jurisdictional requirement could be met. C's Init. Ex. 12 at 7; *see also* Tr. 1884 at 15-18.

other organized unit . . . a phase of a business or of business activity . . . ." *Webster's Third New International Dictionary* 1581 (2002). Given the inclusion of this word, it is impossible to ignore that the regulation clearly contemplates that equipment washing activities must rise to the level of a business "operation" before triggering the coverage of Paragraph (viii). Again, the inclusion of this word narrows the scope of the regulatory language. Without the word "operations" the phrase "equipment cleaning" would have a significantly broader reach.

1. Direct Evidence Offered by Complainant

In her testimony and through her affidavits and inspection reports, Ms. Amy Miller repeatedly stated that during the 2007 inspection she observed a forklift being washed on the loading dock by a man with a hose. Tr. 119 at 2-10; 132 at 12-15; 236 at 7-9; 2229-30. In support of her testimony, Ms. Miller referred to Photo 8 from her 2007 Inspection Report. C's Init. Ex. 14. Photo 8 depicts a forklift at rest on the loading dock. In front of the forklift, the entire width of the loading dock is wet. There are what appear to be push brooms leaning up against the loading dock roof supports on either side of the forklift. *Id.*; Tr. 2236 at 7-20. The Photograph Log for Photo 8 states: "Loading Dock wash drains off to the pavement, toward the center of the yard." *Id.* at 6. While Ms. Miller's testimony on this point was undisturbed by cross-examination, there was no additional testimony offered by Complainant to establish the presence of "equipment cleaning operations."[21/]

The record evidence includes the SWPPP, submitted by Respondent and signed by Mr. Renato Balov, which lists the following "Existing Non-Structural BMPs":

> 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.
>
> * * *

[21/] On direct examination, Respondent's principal, Mr. Renato Balov, testified that the presence of water on the loading dock was the result of the release of meltwater from an adjacent truck carrying fruit or produce. Tr. 1986-88. Mr. Balov testified that the release of water upon opening container doors is not uncommon and he will "wear rain gear when [he] open[s] containers." Tr. 1986 at 19-20. When asked specifically about the water depicted in Photo 8, Mr. Balov testified: "I would say it definitely came out of this what looks like a 40 footer [truck container] to me." Tr. 1988 at 9-11.

> 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.

C's Init. Ex. 12 at 15, 18.

While the SWPPP language supports the assertion by Ms. Miller that Respondent cleans the outside surfaces of its equipment, it is important to note that the SWPPP is dated January 23, 2008, and lists these BMPs as "currently implemented to control pollutants." Unlike the list of Significant Materials or the statements regarding the list of Potential Pollutants, the BMPs listed in the SWPPP are not necessarily descriptions of practices that existed during the relevant period specified in the Complaint. Moreover, evidence in the record indicates that these BMPs were implemented in response to the Administrative Compliance Order (C's Init. Ex. 28), though some language in the SWPPP suggests that certain measures have been in place for some time.[22/] *See* C's Init. Ex. 12 at 10. Putting aside the question of the SWPPP's temporal relevance, the language regarding BMPs explicitly demonstrates a deliberate effort to clean equipment surfaces to prevent "contact between operational fluids and storm water." It does not follow that a practice implemented to prevent stormwater contamination would

[22/] In its Posthearing Brief, Complainant argued that despite the later creation of the SWPPP, it was nevertheless "indicative of practices at the Facility between 2004 and 2007, since the Facility's operations changed little during this time period." C's Post-Hrg. Br. at 17 (citing Tr. 1433 at 20-22 (Testimony by Respondent's expert, Mr. Anthony Severini, that Respondent's principals "basically said that the site operations have been, essentially, unchanged for a decade.")). This argument makes a leap by treating BMPs, implemented following an Administrative Compliance Order, as part of Respondent's ongoing commercial "operations" that predate the Order that prompted the creation of the BMPs in the first place. While inferences concerning references to permanent structures and specific statements about ongoing activities might properly be drawn based on the SWPPP, it is not enough for Complainant to rely on the SWPPP as *prima facie* evidence of variable activities or temporal events that may or may not have occurred during the relevant period.

In addition, the reliability of the SWPPP is compromised by statements from Respondent's principal that it submitted the NOI and prepared the SWPPP as a protective measure in response to a direct Administrative Order requiring compliance. *See* Tr. 2033-34 ("Well, I felt just taking care, getting the compliance done. Of course, I am always kind of wary of not getting the compliance for something [that] might [a]ffect some of my other compliances. So that was my biggest concern."). Mr. Balov's testimony indicated that because he did not want to jeopardize his other compliance, the NOI was submitted "just to be on the safe side." Tr. 2035 at 18-22; 2038 at 11-13. As such, the information in the SWPPP could be viewed as an effort by Respondent simply to meet the requirements and come into compliance.

create the necessary operational processes to bring the entire facility within the jurisdiction of the stormwater regulations in the first place. Additional light was shed on this issue by Respondent's own witnesses.

2. Evidence Elicited from Respondent's Witnesses

One of Respondent's expert witnesses, Mr. Mark Bulot, testified on direct that he had asked the Respondent's principals "what they did in operating and maintaining their forklifts." Tr. 1611 at 10-12. The testimony continued:

> Q: And what did they tell you?
>
> A: Basically, there is occasional topping off of hydraulic fluid and occasionally washing, you know, hosing off the dust.
>
> Q: And that's it, right?
>
> A: Pretty much, yes.

Id. at 13-19.

On cross-examination of Mr. Balov, counsel for EPA spent significant time reviewing the statements in the SWPPP related to BMPs and questioning Mr. Balov about Respondent's practices. *See* C's Init. Ex. 12; Tr. 2116-2129. Mr. Balov was asked to explain the meaning of certain statements contained in the SWPPP he signed on behalf of Respondent. In the SWPPP, Respondent states that "[t]he outside surfaces of the trucks, trailers, and containers are cleaned regularly." C's Init. Ex. 12 at 15. When asked how that cleaning is accomplished, Mr. Balov stated:

> A: Well, we don't clean trucks. We don't clean trailers. I can't recall us cleaning any containers because the containers that we hold are the ones we use for fum[igation] and storage.

Tr. 2116 at 13-20. When asked to explain the apparent discrepancy between this testimony and statements in the SWPPP, Mr. Balov stated that the SWPPP was "partially inaccurate" and further testified:

> A: Well the trucks, we don't have trucks to clean. Trailers, we don't have trailers to clean. And the only containers on-site are storage containers. I guess if one of them got dirty somehow, we would have to clean it but that would require some sort of washing. So I think the easiest way to do that would

just to be contact Terry [Balog] and ask him how to do about it.

Tr. 2117-18.

Thereafter, Complainant followed with a series of questions dealing with the apparent discontinuity between the statements made by Mr. Balov in the SWPPP and his testimony at the hearing. In response to these questions, Mr. Balov expressed some confusion and testified that in the event he were confronted with the need to clean any of the operational equipment listed in the SWPPP (whether storage containers, roll-off bins, or forklifts) he would rely on third parties to assist him. Tr. 2119 at 5-20; 2122 at 4-12; 2123 at 4-16 (stating that forklift fluids were taken care of by a mechanic paid by the leasing company and were cleaned using an industrial vacuum cleaner); 2125 at 4-19. It should be noted that, generally, even if a facility operator is not the entity that performs the actual work, washing done on its premises at its election is the responsibility of the facility operator and properly characterized discharges associated with industrial activity that flow therefrom would rightly be considered a discharge by the facility operator. In short, such liability could not be "contracted out" to on-site workers. However, in this case, Complainant was unable to establish that any outside entity performed regular cleaning operations at San Pedro Forklift.[23/]

Counsel for Complainant asked specifically about Respondent's practice regarding forklifts:

Q: How do you clean the forklifts?

A: Well just like that, with the industrial Shop-Vac.

Q: Yes, I guess my question was, is that the only thing you use to clean a forklift?

A: I believe so. I can't give you a completely accurate answer on that.

[23/] When asked whether she had any evidence that Respondent owned any trucks, Ms. Miller testified that she did not know. She was then asked why an entity such as Respondent would repair trucks it did not own. Ms. Miller offered the following speculative answer: "Well, on past inspections at transloading facilities, sometimes private truck owners will have their truck breakdown at a facility and will do a quick repair. And there appeared to be evidence that lubrication was changed, a battery would appear to be a used battery, was sitting on a crate. Those are indications that there is some sort of maintenance activity happening." Tr. 244 at 9-17. While such a theory might find traction in specific scenarios where these facts exist, Complainant did not offer evidence that established that trucks were being regularly or even occasionally maintained at Respondent's Facility.

> Q: You believe so. Do you ever wash a forklift?
>
> A: I have never washed a forklift in my life.
>
> Q: Not you. Has anyone in your employ at San Pedro Forklift ever hosed down a forklift?
>
> A: I couldn't tell you for sure.

Tr. 2125 at 4-19. By way of concluding cross-examination of Mr. Balov, Counsel for Complainant asked the following questions:

> Q: Again for the time period of September '04 to December '07, was oil stored on-site at San Pedro Forklift?
>
> A: No.
>
> Q: For the time period in question, did you ever wash forklifts on-site?
>
> A: I don't recollect.
>
> Q: Did anyone wash forklifts on-site at San Pedro Forklift?
>
> A: I can't give you an honest answer.

Tr. 2181 at 8-17.[24]

3. Conclusion as to Equipment Washing Operations

Given Mr. Balov's inability to recall the meaning and scope of the various statements in the SWPPP, combined with his inability to "give an honest answer" to question of whether forklift washing ever occurred generally, his testimony

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[24] Counsel for Complainant made several attempts to question Mr. Balov regarding Respondent's December 12, 2007, response to EPA's administrative order. Tr. 2140 at 8-15; 2142 at 13-19; 2146 at 9-19; 2147 at 4-15; 2149-50; 2151 at 7-17. The administrative order states that "[w]ithin 30 days of receipt of this Order, Respondent shall complete interim control measures (Interim Measures) for all of the Facility's areas of industrial activity, including: a Containment of runoff vehicle washing . . . ." C's Init. Ex. 31 at 3; Tr. 2164 at 1-9. The response states: "Respondent eliminated vehicle washing." *Id.* Although the question was allowed over multiple objections, Tr. 2164 at 15-16, and despite Complainant's stated intent to recall the witness following resolution of any objections, Tr. 2153 at 8-11, no actual testimony was elicited from Respondent's witnesses regarding this statement and no further evidence was admitted into the record on this issue.

disputing Ms. Miller's observations is unpersuasive. Nevertheless, even assuming *arguendo* that Ms. Miller's observations are true and accurate, they do not support the inference that Respondent was engaged in equipment cleaning operations that would trigger the jurisdiction of 40 C.F.R. § 122.26(b)(14)(viii).

This conclusion is necessarily based on the particular facts presented by this case. The credible testimony by Ms. Miller establishes that during the first EPA inspection, she observed a man rinsing a forklift with a garden hose while on the loading dock.[25/] Tr. 119 at 1-10; 231-32. In addition, the SWPPP contained several statements indicating that Respondent was aware of the potential for contact between equipment fluids and precipitation and created protocols in response to EPA's Compliance Order in order to minimize that contact. C's Init. Ex. 12. 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.

This is not simply syntactical minutiae. 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. The preamble to the Final Rule specifically mentions "individual car washing," among other things,[26/] when it states that commenters to the Proposed Rule "noted that, unless these flows are classified as storm water, permits would be required for these discharges." Final Rule at 47,995. Although the commenters noted an apparent dilemma that not incorporating traditionally de minimis discharges (i.e., individual car washing) in the regulation's definition of stormwater would expose such discharges to general regulation under the NPDES program, EPA stated that "this rulemaking is not an appropriate forum" for addressing "such non-storm water discharges." *Id.* Notably, the preamble to the Final Rule states that "Congress did not intend that the term storm water

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[25/] This alone presents the question as to whether "cleaning" could reasonably denote "rinsing" if no soap, acids, or other surfactants were used in the process. However, for purposes of this decision cleaning and rinsing are treated interchangeably.

[26/] Individual car washing is part of a list that includes such recognized non-industrial, non-stormwater flows as: fire hydrant flushing, uncontaminated pumped group water, discharges from potable water sources, springs, lawn watering, and flows from riparian habitats and wetlands. 55 Fed. Reg. at 47,995.

be used to describe any discharge that has a de minimis amount of pollutants, nor did it intend for section 402(p) to be used to provide a moratorium from permitting *other* non-storm water discharges." *Id.* (emphasis added).[27] Given that the absence of language in Final Rule concerning the need for a permit for such non-stormwater events, as well as the language in the CGP excluding activities such as individual car washing, it would be unreasonable to use these same activities as the basis for classifying an entity as a discharger associated with industrial activity and requiring a NPDES stormwater permit.

Based on the evidence in the record, San Pedro Forklift cannot properly be brought within the jurisdiction of Paragraph (viii) because it is a transportation facility with equipment cleaning operations. Jurisdiction under this prong of the narrative standard was not established.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Liability for the allegations contained in the Complaint is predicated on a finding that Respondent San Pedro Forklift is regulated under Paragraph (viii), 40 C.F.R. § 122.26(b)(14)(viii), as a "transportation facility" having a Standard Industrial Classification Code in the 42xx family. The narrative standard therein identifies three conditions, one of which must be met before a transportation facility is brought within the scope of Paragraph (viii). Complainant submitted evidence to support two of those conditions: (1) Respondent's transportation facility had a vehicle maintenance shop and (2) Respondent's transportation facility had equipment cleaning operations. 40 C.F.R. § 122.26(b)(14)(viii). According to Complainant's primary fact witness and inspector, Amy Miller, the basis for her determination that Respondent's Facility fell within the scope of Paragraph (viii) was an overall assessment of the site conditions and the totality of the circumstances, all of which indicated to her that vehicle maintenance activities and equipment washing operations were occurring on site. *See* Tr. 245-46; 255 at 14-16; 308 at 7-14; 351 at 1-6. However, even assuming, as above, that Ms. Miller's observations are correct, the evidence proffered by Complainant does not establish a sufficient basis for asserting jurisdiction under Paragraph (viii).

Because I find that San Pedro Forklift is not a transportation facility with either a vehicle maintenance shop or equipment cleaning operations, it follows that Respondent is

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[27] This position is repeated in the MSGP 2008, which identifies many of the flows mentioned above as "Allowable Non-Stormwater Discharges" (including fire hydrant flushings, landscape watering, and "routine external building washdown that does not use detergents"). C's Init. Ex. 55 at 2.

not a discharger associated with industrial activity as defined by the regulations.[28] 40 C.F.R. § 122.26(b)(14)(viii). Because Respondent is not a discharger associated with industrial activity as alleged in the Complaint, Compl. ¶ 7, it is not under an obligation to apply for a NPDES stormwater permit. Nor is Respondent required to submit a Notice of Intent, Compl. ¶ 9, to be covered under the General Permit. Because Respondent is not required to apply for the General Permit, it is also not required to prepare a SWPPP. Compl. ¶ 10. Accordingly, I find Respondent not liable for the violations alleged in the Complaint.

The scope of this determination should not be overestimated. The determination that Respondent's activities do not rise to the standard set forth in Paragraph (viii) does not mean that Respondent may not otherwise be regulated pursuant to Section 402(p) of the Act. However, the allegations in the Complaint refer only to Respondent's status as a transportation facility with the SIC Code 4213. Alternative designations were discussed at hearing, but Complainant argued they were mistaken designations and focused solely on the SIC 4213 self-designation by Respondent.[29] Section 402(p)(2)(E) of the Act authorizes case-by-case designations of stormwater discharges under certain circumstances, particularly where discharges contribute to violations of water quality standards. *See* Final Rule at 48,002 (third and fourth tier permitting priorities for issuing permits cover specific industries and individual facilities respectively). Under the Final Rule, case-by-case designations are made under regulatory procedures found at 40 C.F.R. § 124.52. However, Complainant did not allege or argue such alternative avenues of regulation, and thus they are not considered here.

VII. ORDER

For the reasons set forth above, Respondent San Pedro Forklift is found not liable for any of the Counts alleged in the Complaint. Accordingly, the Complaint is hereby dismissed.[30]

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[28] This conclusion is bolstered by the fact that General Permit contains the same jurisdictional language as Paragraph (viii).

[29] In addition, the Complaint alleges that Respondent is primarily engaged in trucking of "recycled materials." Compl. ¶ 17. The record does not adequately support this allegation.

[30] Consequently, I find that the oral motion to dismiss, made by Respondent's counsel pursuant to California Rules of Professional Conduct, is moot and will not be addressed further. *See* Tr. 2050 at 8-13; 2071 at 11-12.

VIII. APPEAL RIGHTS

This Order constitutes an Initial Decision as provided in Section 22.17(c) of the Rules of Practice, 40 C.F.R. § 22.17(c). Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency unless an appeal is filed with the Environmental Appeals Board within thirty (30) days of service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

____
Barbara A. Gunning
Administrative Law Judge

Dated: January 27, 2012
Washington, D.C.