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March 5, 2009

Via UPS Next Day Air

The Hon. Covette Rooney
Occupational Safety and Health Review Commission
One Lafayette Centre
1120 20th Street, N.W., Room 990
Washington, DC 20036-3457

Re: *Secretary of Labor v. Imperial Sugar Company; Imperial-Savannah, L.P.*,
Docket No. 08-1104

Dear Judge Rooney:

Enclosed for filing in the above-reference case are (1) Respondents' Motion to Depose OSHA Compliance Officers, Memorandum in Support and Proposed Order; and (2) Respondents' Exhibits to Motion to Depose OSHA Compliance Officers. These two documents are in pdf form on the enclosed CD. I made an unsuccessful attempt to file and serve these by email, but received an error message that the data exceeded the system limits. Accordingly, pursuant to the instructions for electronic filing, I am sending the documents via CD. Because the parties have agreed to service by electronic means, and under the Review Commission's rules, filing is effective upon the Commission's receipt of the electronic transmission, I will assume that the service date upon Complainant will be counted from the date of receipt as well. I apologize for any inconvenience this may cause. Thank you.

Sincerely,



Charles H. Morgan

CHM:chm

Enclosure

cc: Karen E. Mock, Esq. (via UPS Next Day Air w/encl.)
Angela F. Donaldson, Esq. (via UPS Next Day Air w/encl.)
Matthew J. Gilligan, Esq.
Ashley D. Brightwell, Esq.
Jeremy Tucker, Esq.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,)	
)	
Complainant)	
)	
v.)	Docket No. 08-1104
)	
IMPERIAL SUGAR COMPANY;)	
IMPERIAL-SAVANNAH, L.P.)	
)	
Respondents.)	

RESPONDENTS' MOTION TO DEPOSE OSHA COMPLIANCE OFFICERS

Pursuant to 29 C.F.R. §§ 2200.40(a), 2200.52(b), 2200.56(a), and other applicable law, Respondents Imperial Sugar Company and Imperial-Savannah, L.P. (collectively "Imperial") respectfully move for an order allowing for certain depositions of OSHA and state plan compliance officers. Through the depositions, Imperial seeks information relating to industry practice, which is commonly recognized as admissible evidence in cases analogous to the instant action. Moreover, Complainant has explicitly and repeatedly made industry practice an issue in this litigation. Accordingly, the information sought is relevant and is reasonably calculated to lead to discovery of admissible evidence. For these reasons, and for the additional reasons set forth in Respondents' Memorandum in Support of Respondents' Motion to Depose OSHA Compliance Officers, an order allowing the requested depositions should be entered. The specific witnesses at issue in this motion are as follows:

1. Rule 30(b)(6) Designee for OSHA Inspection No. 311614143 and Inspection No. 312308117, Inspection Site: U.S. Sugar Co., Inc., 692 Bailey Avenue, Buffalo, NY 14240.
2. Terre Neil, Maryland OSHA, Region II, 1131 Bel Air Road, LL1, Bel Air, Maryland 21014.

3. Raj Janack, Maryland OSHA, Region III, 1100 North Eutaw Street, Room 611, Baltimore, MD 21201.
4. Kevin Gilday, Michigan OSHA, State Secondary Complex - General Office Bldg, 7150 Harris Drive, Dimondale, MI 48821.
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15. Rule 30(b)(6) Designee for OSHA Inspection No. 307576017, Inspection Site: Warren Chairworks, Inc., 30 Cutler Street, Warren, RI 02885

Pursuant to 29 C.F.R. § 2200.40(a) and the February 10, 2008 Notice of Hearing, Scheduling Order and Special Notices, counsel for Respondents hereby certifies that the parties have discussed the substance of this Motion and the parties have made a good faith effort to resolve this matter. Complainant's counsel has indicated that Complainant does not consent to the requested depositions and opposes the instant Motion.

Respectfully submitted this 5th day of March, 2009.

/s/ Charles H. Morgan

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Attorneys for Respondents

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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 v.) Docket No. 08-1104
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 IMPERIAL SUGAR COMPANY;)
 IMPERIAL-SAVANNAH, L.P.)
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**MEMORANDUM IN SUPPORT OF
RESPONDENTS' MOTION TO DEPOSE OSHA COMPLIANCE OFFICERS**

Pursuant to 29 C.F.R. §§ 2200.40(a), 2200.52(b), 2200.56(a), and other applicable law, Respondents Imperial Sugar Company and Imperial-Savannah, L.P. (collectively "Imperial") respectfully move for an order allowing for certain depositions of OSHA and state plan compliance officers. Through these depositions, Imperial seeks information relating to industry practice, which is commonly recognized as relevant, admissible evidence in cases analogous to the instant action. Moreover, Complainant has explicitly and repeatedly made industry practice an issue in this litigation. Accordingly, Imperial respectfully submits that this information is, at a minimum, discoverable.

I. FACTS AND ALLEGATIONS AT ISSUE

The citations at issue in this action contain 124 separate items alleging violations of various OSHA standards, with proposed penalties totaling \$5,062,000. Of these 124 items, twelve (12) items are alleged "willful," "egregious" violations of the housekeeping standard at 29 C.F.R. § 1910.22(1) and (2), with penalties totaling \$840,000. Three (3) items are alleged "willful" general duty clause citations, alleging recognized hazards related to combustible dust, with associated penalties totaling \$210,000. Five (5) items

are alleged “willful,” “egregious” violations of 29 C.F.R. § 1910.178(c)(2)(vii) related to requirements of powered industrial trucks in hazardous locations, with associated penalties totaling \$350,000. Forty-four (44) of the items allege “willful,” “egregious” violations of 29 C.F.R. § 1910.307(c), related to requirements for electrical equipment in hazardous locations, with associated penalties totaling \$3,080,000. Each of these items allege a hazard or relate to an alleged hazard of combustible dust.

A. Complainant’s Reliance on Industry Practice and Knowledge as a Basis for the Allegations in the Citations.

From Complainant’s notations in its file, various public statements regarding this matter, and its posture to date in the instant litigation, it is clear that Complainant has relied and intends to rely, at least in part, on its own view of industry practice and knowledge regarding combustible dust hazards as a basis for the citations in this matter.

For example:

- In Complainant’s Response to Respondents’ Motion to Dismiss Citation 2, Items 4 Through 15, Complainant states that “[f]actual matters relevant to the constitutionality of a standard include evidence of . . . practices of other employers in the industry.” (Complainant’s Resp. to Mot. to Dismiss at 14.)
- In Complainant’s Response to Respondents’ Motion for Partial Summary Judgment, Complainant states that “genuine issues of material fact exist as to whether the sugar refining industry . . . knew of the fire and explosion hazards associated with bucket elevators used in their operations,” “Imperial’s Motion should be rejected and the Secretary should be permitted to discover how others in Imperial’s industry interpret and apply the NFPA to bucket elevators,” and [t]he sugar refining industry’s knowledge of hazards posed by bucket elevators of the type used at Imperial’s facility is a factual issue that should be explored in discovery.” (Complainant’s Resp. to Mot. for Partial Sum. Judgment at 1, 7-8.)
- In Complainant’s inspection file, apparently to support the housekeeping citations, at Citation 2, Items 4 through 15, Complainant notes that “Sugar dust is a recognized hazard in the industry.”

- Further, according to Complainant's inspection file, Complainant apparently also considered what "would be reasonably expected in this or for this industry" in making its decision to classify certain citations as willful or egregious.

As these examples clearly illustrate, Complainant contends that the issue of industry practice is relevant to the combustible dust related citations asserted against Respondents.

B. The Discovery Sought by Imperial.

The main focus of the underlying inspection in this matter was combustible dust. Accordingly, during Complainant's investigation, Imperial began submitting Freedom of Information Act ("FOIA") requests to various area offices of Complainant as well as state occupational safety and health programs seeking information related to inspections of companies in the industries identified by Complainant as likely to generate combustible dust. Documentation received in response to the FOIA requests shows that (1) significant accumulations of dust are apparently quite commonplace in companies throughout the sugar industry and other industries that Complainant recognizes as having the potential for hazardous accumulations of combustible dust; and (2) despite photographs depicting obvious accumulations of combustible dust, industry, as well as Complainant and OSHA state plan agencies, apparently routinely fail to recognize hazards related to such accumulations, whether related to combustible dust in general, issues covered by NFPA standards, requirements of powered industrial trucks in hazardous locations, or requirements for electrical equipment in hazardous atmospheres. Photographs received from inspections conducted by Complainant and OSHA state plan agencies from 2004 through 2007 are attached hereto. (See Attachment 1 of Declaration of Lina Locke Watson ("Watson Decl."), attached hereto as Exhibit "A").

These FOIA responses have also provided information directly relevant to the issues raised in Respondents' Motion to Dismiss and Motion for Partial Summary Judgment. For example, in citations against a sugar processor in Buffalo, New York issued in September, 2008 relating to an inspection occurring after Complainant's inspection of Imperial, Complainant specifically defined the "hazardous accumulation" under 1910.22 as amounts "greater than 1/32". (See Attachment 2 of Watson Decl., attached hereto as Exhibit "A"). In stark contrast, in the instant case Complainant has refused to disclose to Imperial Complainant's definition of a "hazardous accumulation," stating that "[i]t is sufficient to allege an accumulation of dust as a condition that is not orderly, clean or sanitary." (See, e.g., Complainant's Resp. to Mot. to Dismiss at 9). Regarding the same inspection, Complainant determined that bucket elevators that transfer sugar but have belt speeds below 500 ft/min are exempt from explosion venting requirements described in NFPA 61, yet here Complainant urges the opposite, claiming that Imperial's bucket elevators are not exempt. (See Attachment 3 of Watson Decl., attached hereto as Exhibit "A"; Complainant's Resp. to Partial Mot. for Sum. Judgment at 5-8).

Desiring to discover evidence of industry recognition regarding combustible dust hazards (and the apparent lack of consensus evident therefrom) as relevant to the claims and defenses in this matter, Imperial now seeks to depose individuals and Rule 30(b)(6) designees in order to (1) authenticate the documents Imperial has received via the FOIA requests; and (2) obtain testimony regarding the actual conditions that existed during the underlying inspections. Importantly, Imperial does not seek any information that may be protected by the deliberative process privilege or any other privilege. The specific

depositions Imperial seeks as part of this motion are listed in the Motion hereto. (*See also* February 5, 2009 letter from Charles H. Morgan to Karen E. Mock, attached hereto as Exhibit “B”).¹ Complainant has refused to consent to these depositions, although it is unclear as to the exact basis for this refusal to consent. (*See* February 9, 2009 Letter from Karen E. Mock to Charles H. Morgan, attached hereto as Exhibit “C”). Indeed, Complainant requested that Imperial produce the FOIA files relating to these proposed depositions, stating that such files are responsive to one or more of Complainant’s discovery requests. (*See id.*) Based upon Complainant’s insistence that the FOIA files are the proper subjects of discovery, Imperial promptly produced said files on February 13, 2009. (*See* February 13, 2009 Letter from Charles H. Morgan to Karen E. Mock, attached hereto as Exhibit “D”). Complainant nevertheless continues to refuse to consent to the depositions regarding these files, and Imperial accordingly files this motion for an order allowing same.

II. ARGUMENT AND CITATION OF AUTHORITY

A. The Review Commission’s Discovery Rules are Broad and Liberally Construed to Allow Discovery of Relevant Information.

Pursuant to 29 C.F.R. § 2200.56(a), depositions are a legitimate and permissible means for gathering information, and in the absence of an agreement between the parties, depositions are permitted following the filing of a motion stating “good and just reasons.” 29 C.F.R. § 2200.56(a). Further, 29 C.F.R. § 2200.52(b) allows for the discovery of “any matter that is not privileged and that is relevant to the subject matter involved in the

¹ Imperial noticed the Buffalo deposition and served subpoenas on the Maryland and Michigan witnesses on the mistaken assumption that Complainant had consented to depositions generally being taken in this action. Complainant has corrected Imperial’s mistaken assumption, and Imperial has since notified Complainant and the subpoenaed witnesses that the proposed depositions will not go forward until and unless permitted by the Review Commission.

pending case.” Notably, “[i]t is not ground for objection that the information or response sought will be inadmissible at the hearing, if the information or response appears reasonably calculated to lead to discovery of admissible evidence, regardless of which party has the burden of proof.” 29 C.F.R. § 2200.52(b). These provisions are nearly identical to that under Federal Rule of Civil Procedure 26(b)(1), which provides that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense” and further clarifies that the information sought “need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1). The breadth of these discovery parameters is well recognized. *See, e.g., Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (Under Rule 26, relevancy is “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.”); *United States v. Holley*, 942 F.2d 916, 924 (5th Cir. 1991) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)) (“[T]he deposition-discovery rules are to be accorded a broad and liberal treatment.”).

Assuming a request fits within this broad definition of discoverability, it shall only be limited to the extent (1) the discovery is “unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity to obtain the information sought by discovery in the action; or (3) the discovery is unduly burdensome or expensive, taking into account the needs of the case, limitations on the parties’ resources, and the importance of the issues in litigation.” 29 C.F.R. § 2200.52(c); *see also* Fed. R. Civ. P. 26(b)(2)(C) (setting forth similar limitations). Because the

depositions at issue in the instant motion are undeniably relevant to subject matter of the instant action and are in no way unreasonable or unduly burdensome, especially in light of the number of citations and size of the proposed penalties at issue here, the Commission should grant Imperial the modest discovery it seeks.

B. The Deposition Testimony of OSHA Investigators is Undeniably Relevant to the Subject Matter Involved in the Pending Case.

As an initial matter, as set out above, Complainant has already conceded via notations in its inspection file, various public statements regarding this matter, and its briefing to date that industry practice is relevant to the instant dispute and that it relied on its own view of industry practice in issuing the citations against Imperial. Even if Complainant had not put industry custom at issue by its own actions, however, the case law is clear that, where general standards are at issue, the standards are given meaning in particular situations by reference to objective criteria, including evidence of industry custom and practice from persons familiar with the industry. *Sec'y of Labor v. Siemens Energy & Automation, Inc.*, 20 O.S.H. Cas. (BNA) 2196, 2005 O.S.H.D. (CCH) ¶ 32880 (2005) (explaining that 1910.217(e)(1)(i), which requires employer “to establish and follow a program of periodic and regular inspections of his power presses to ensure that all their parts, auxiliary equipment, and safeguards are in a safe operating condition and adjustment” is a broad, performance-based standard which “may be given meaning in particular situations by reference to objective criteria, including the knowledge of reasonable persons familiar with the industry”); *Sec'y of Labor v. Brooks Well Servicing*, 20 O.S.H. Cas. (BNA) 1286, 2002 O.S.H.D. (CCH) ¶ 32,675 (OSHRC 2003) (because the phrase (in the former version of 1910.36(b)) “‘exits sufficient to permit the prompt escape’ does not state with specificity what an employer must do to comply with the

standard, we apply the well-established principle that a broadly-worded regulation may be given meaning in a particular situation by reference to objective criteria, including the knowledge and perception of reasonable persons knowledgeable about the industry”). Here, having alleged numerous violations of the broad housekeeping standard set forth at 29 C.F.R. § 1910.22(a)(1) and (2), as well as other standards the violation of which hinges upon the apparently elusive definition of a “hazardous accumulation” of dust, Complainant cannot deny that evidence of industry practice is relevant and admissible in determining whether violations have occurred, let alone deny that such evidence is discoverable. *See, e.g., Sec’y of Labor v. Cincinnati Gas & Elec. Co.*, 2002 O.S.H.D. (CCH) ¶ 32622 (2002) (“The Secretary agreed at the outset of the hearing that § 1910.22(a)(1) is a general standard, for which the Secretary bears the burden of proving the cited conditions created a hazard”).

That Imperial seeks to discover facts relating to industry recognition from Complainant’s compliance officers is entirely appropriate. The Review Commission has frequently allowed testimony from compliance officers regarding their recollection of inspections to serve as a basis for industry standards and recognition. *See, e.g., Sec’y of Labor v. Trinity Indus., Inc.*, 15 O.S.H. Cas. (BNA) 1481, 1992 O.S.H.D. (CCH) ¶ 29582 (1992) (relying on the testimony of an experienced OSHA compliance officer in determining whether those in the industry recognize the hazard and how they deal with the hazard); *Sec’y of Labor v. Lukens Steel Co.*, 10 O.S.H. Cas. (BNA) 1115, 1981 O.S.H.D. (CCH) ¶ 25742 (1981) (“In our view, the most compelling evidence in this record relevant to the application of the reasonable person test is the uncontradicted testimony of [OSHA compliance officer] . . .”). While Complainant may attempt to rely

on the anecdotal and hearsay testimony of what its own view of industry practice and knowledge may be, Imperial believes that the specific testimony of what was actually witnessed and documented by Complainant's own photographs from 2004 through 2007 is more appropriate and likely more accurate than anecdotal memory. *Cf. Sec'y of Labor v. Keating Bldg. Corp.*, 21 O.S.H. Cas. (BNA) 1513, n.3 (OSHRC ALJ 2006) (Secretary's proposed expert on industry practice in the cast-in-place concrete construction industry not allowed to testify because of his lack of any actual hands-on involvement in an active concrete project). Accordingly, in an effort to determine industry custom which, as set forth above, is clearly relevant to the instant action, Imperial seeks specific, limited discovery in the form of depositions of certain OSHA and state plan compliance officers. In these depositions, Imperial seeks to discover what was seen at other inspections where there appear to have been large dust accumulations, whether the dust present in these inspections was in fact combustible, and the level of accumulation actually present at these employer sites.²

² Any reliance by Complainant on *Secretary of Labor v. Seibel Modern Mfg. & Welding Corp.*, 15 O.S.H. Cas. (BNA) 1218, 1991 O.S.H.D. (CCH) ¶ 29442 (1991) is misplaced. In *Seibel*, a manufacturer was cited for violating a standard where comprehensive specifications were available to the company, and the employer's primary defense was that it had not been cited previously for violating that standard. 1991 O.S.H.D. at ¶ 39,678-79. *Id.* The Commission found that the Secretary was not precluded from pursuing a citation simply because a prior investigation of that same employer did not result in a citation. *Id.* at 39,681. This determination has no bearing on the present issue, namely whether evidence of how the industry as a whole interprets the vague and general standards on combustible dust is relevant and thus discoverable. Indeed, in the principal case relied on by *Seibel*, *Lukens Steel Co.*, the Secretary specifically relied on industry practice in determining whether an employer failed to comply with the standard at issue and even employed an OSHA officer to testify about industry practice. *Lukens Steel Co.*, 1981 O.S.H.D. at 32,119. Further, Review Commission decisions decided after *Seibel* have explicitly recognized the relevance of both industry practice as well as a pattern of administrative enforcement. *See, e.g., Sec'y of Labor v. Latite Roofing & Sheet Metal Co.*, 2005 O.S.H.D. (CCH) ¶ 32858 (2005) (noting that "common practice" and OSHA's

C. The Requested Discovery is Entirely Reasonable Under 29 C.F.R. § 2200.52(c).

Having established the relevancy of the requested deposition testimony, pursuant to 29 C.F.R. § 2200.52, Imperial is entitled to such discovery so long as it is not (1) unreasonably cumulative or duplicative, or obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) a matter that Imperial has had ample opportunity to obtain previously; or (3) unduly burdensome or expensive, taking into account the needs of the case, limitations on the parties' resources, and the importance of the issues in litigation. None of these bases for limitation are present here. First, Complainant has already indicated a desire to take forty-five (45) depositions; therefore, it can hardly be said that Imperial's desire to take approximately the same total number of depositions is unduly burdensome. Second, Imperial has sought Rule 30(b)(6) depositions from Complainant, which should serve to ensure efficiency. Indeed, Imperial has indicated that the requested depositions will be kept at or under three (3) hours in duration. Third, Imperial has worked diligently during Complainant's investigation to obtain information regarding industry practice via FOIA requests, and seeks the instant depositions because the additional information and authentication needed cannot be obtained elsewhere. Finally, Imperial respectfully submits that the discovery sought via the instant motion is entirely reasonable, especially in light of the numerous citations at issue and the sheer size of the penalties proposed, and should therefore be granted.

pattern of enforcement are relevant to fair notice defense).

III. CONCLUSION

For the foregoing reasons, Imperial respectfully requests that the Review Commission enter an order permitting certain depositions of OSHA compliance officers.

Respectfully submitted this 5th day of March 2009.

/s/ Charles H. Morgan

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Attorneys for Respondents

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 IMPERIAL-SAVANNAH, L.P.)
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ORDER PERMITTING DEPOSITIONS OF OSHA COMPLIANCE OFFICERS
(Proposed)

Pursuant to 29 C.F. R. § 2200.56(a) and for good cause shown, Respondents' Motion to Depose OSHA Compliance Officers is hereby GRANTED, and Respondents are permitted to take the depositions listed in the Motion. Such depositions shall be limited to no more than three (3) hours each in duration and shall be taken at times and locations convenient to the parties and the witnesses. Pursuant to 29 C.F.R. § 2200.56(c), said depositions may be taken after ten days' written notice to Complainant.

SO ORDERED this ____ day of _____, 2009.

The Honorable Covette Rooney
U.S. OSHRC Judge

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CERTIFICATE OF SERVICE

I certify that all parties have consented that all papers required to be served in this action may be served and filed electronically. I further certify that a copy of RESPONDENTS' MOTION TO DEPOSE OSHA COMPLIANCE OFFICERS, MEMORANDUM IN SUPPORT, PROPOSED ORDER, and EXHIBITS A, B, C, and D were served via UPS Next Day Air¹ on March 5, 2009 on the following counsel for Complainant:

Karen E. Mock
Mock.Karen@dol.gov
Angela F. Donaldson
Donaldson.Angela@dol.gov
Office of the Solicitor
U.S. Department of Labor
61 Forsyth Street S.W.
Room 7T10
Atlanta, Georgia 30303

/s/ Charles H. Morgan
Charles H. Morgan
Alston & Bird LLP
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charlie.morgan@alston.com

¹ Respondent attempted to file and serve by email, but received an error message that the data on the exhibits exceeded the system limits.

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Pursuant to 29 C.F.R. § 2200.40(a) and the February 10, 2008 Notice of Hearing, Scheduling Order and Special Notices, counsel for Respondents hereby certifies that the parties have discussed the substance of this Motion and the parties have made a good faith effort to resolve this matter. Complainant's counsel has indicated that Complainant does not consent to the requested depositions and opposes the instant Motion.

Respectfully submitted this 5th day of March, 2009.

/s/ Charles H. Morgan

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Atlanta, Georgia 30309-3424
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Attorneys for Respondents

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,)
)
 Complainant)
)
 v.) Docket No. 08-1104
)
 IMPERIAL SUGAR COMPANY;)
 IMPERIAL-SAVANNAH, L.P.)
)
 Respondents.)
 _____)

**MEMORANDUM IN SUPPORT OF
RESPONDENTS' MOTION TO DEPOSE OSHA COMPLIANCE OFFICERS**

Pursuant to 29 C.F.R. §§ 2200.40(a), 2200.52(b), 2200.56(a), and other applicable law, Respondents Imperial Sugar Company and Imperial-Savannah, L.P. (collectively "Imperial") respectfully move for an order allowing for certain depositions of OSHA and state plan compliance officers. Through these depositions, Imperial seeks information relating to industry practice, which is commonly recognized as relevant, admissible evidence in cases analogous to the instant action. Moreover, Complainant has explicitly and repeatedly made industry practice an issue in this litigation. Accordingly, Imperial respectfully submits that this information is, at a minimum, discoverable.

I. FACTS AND ALLEGATIONS AT ISSUE

The citations at issue in this action contain 124 separate items alleging violations of various OSHA standards, with proposed penalties totaling \$5,062,000. Of these 124 items, twelve (12) items are alleged "willful," "egregious" violations of the housekeeping standard at 29 C.F.R. § 1910.22(1) and (2), with penalties totaling \$840,000. Three (3) items are alleged "willful" general duty clause citations, alleging recognized hazards related to combustible dust, with associated penalties totaling \$210,000. Five (5) items

are alleged “willful,” “egregious” violations of 29 C.F.R. § 1910.178(c)(2)(vii) related to requirements of powered industrial trucks in hazardous locations, with associated penalties totaling \$350,000. Forty-four (44) of the items allege “willful,” “egregious” violations of 29 C.F.R. § 1910.307(c), related to requirements for electrical equipment in hazardous locations, with associated penalties totaling \$3,080,000. Each of these items allege a hazard or relate to an alleged hazard of combustible dust.

A. Complainant’s Reliance on Industry Practice and Knowledge as a Basis for the Allegations in the Citations.

From Complainant’s notations in its file, various public statements regarding this matter, and its posture to date in the instant litigation, it is clear that Complainant has relied and intends to rely, at least in part, on its own view of industry practice and knowledge regarding combustible dust hazards as a basis for the citations in this matter.

For example:

- In Complainant’s Response to Respondents’ Motion to Dismiss Citation 2, Items 4 Through 15, Complainant states that “[f]actual matters relevant to the constitutionality of a standard include evidence of . . . practices of other employers in the industry.” (Complainant’s Resp. to Mot. to Dismiss at 14.)
- In Complainant’s Response to Respondents’ Motion for Partial Summary Judgment, Complainant states that “genuine issues of material fact exist as to whether the sugar refining industry . . . knew of the fire and explosion hazards associated with bucket elevators used in their operations,” “Imperial’s Motion should be rejected and the Secretary should be permitted to discover how others in Imperial’s industry interpret and apply the NFPA to bucket elevators,” and [t]he sugar refining industry’s knowledge of hazards posed by bucket elevators of the type used at Imperial’s facility is a factual issue that should be explored in discovery.” (Complainant’s Resp. to Mot. for Partial Sum. Judgment at 1, 7-8.)
- In Complainant’s inspection file, apparently to support the housekeeping citations, at Citation 2, Items 4 through 15, Complainant notes that “Sugar dust is a recognized hazard in the industry.”

- Further, according to Complainant's inspection file, Complainant apparently also considered what "would be reasonably expected in this or for this industry" in making its decision to classify certain citations as willful or egregious.

As these examples clearly illustrate, Complainant contends that the issue of industry practice is relevant to the combustible dust related citations asserted against Respondents.

B. The Discovery Sought by Imperial.

The main focus of the underlying inspection in this matter was combustible dust. Accordingly, during Complainant's investigation, Imperial began submitting Freedom of Information Act ("FOIA") requests to various area offices of Complainant as well as state occupational safety and health programs seeking information related to inspections of companies in the industries identified by Complainant as likely to generate combustible dust. Documentation received in response to the FOIA requests shows that (1) significant accumulations of dust are apparently quite commonplace in companies throughout the sugar industry and other industries that Complainant recognizes as having the potential for hazardous accumulations of combustible dust; and (2) despite photographs depicting obvious accumulations of combustible dust, industry, as well as Complainant and OSHA state plan agencies, apparently routinely fail to recognize hazards related to such accumulations, whether related to combustible dust in general, issues covered by NFPA standards, requirements of powered industrial trucks in hazardous locations, or requirements for electrical equipment in hazardous atmospheres. Photographs received from inspections conducted by Complainant and OSHA state plan agencies from 2004 through 2007 are attached hereto. (See Attachment 1 of Declaration of Lina Locke Watson ("Watson Decl."), attached hereto as Exhibit "A").

○

These FOIA responses have also provided information directly relevant to the issues raised in Respondents' Motion to Dismiss and Motion for Partial Summary Judgment. For example, in citations against a sugar processor in Buffalo, New York issued in September, 2008 relating to an inspection occurring after Complainant's inspection of Imperial, Complainant specifically defined the "hazardous accumulation" under 1910.22 as amounts "greater than 1/32". (See Attachment 2 of Watson Decl., attached hereto as Exhibit "A"). In stark contrast, in the instant case Complainant has refused to disclose to Imperial Complainant's definition of a "hazardous accumulation," stating that "[i]t is sufficient to allege an accumulation of dust as a condition that is not orderly, clean or sanitary." (See, e.g., Complainant's Resp. to Mot. to Dismiss at 9). Regarding the same inspection, Complainant determined that bucket elevators that transfer sugar but have belt speeds below 500 ft/min are exempt from explosion venting requirements described in NFPA 61, yet here Complainant urges the opposite, claiming that Imperial's bucket elevators are not exempt. (See Attachment 3 of Watson Decl., attached hereto as Exhibit "A"; Complainant's Resp. to Partial Mot. for Sum. Judgment at 5-8).

Desiring to discover evidence of industry recognition regarding combustible dust hazards (and the apparent lack of consensus evident therefrom) as relevant to the claims and defenses in this matter, Imperial now seeks to depose individuals and Rule 30(b)(6) designees in order to (1) authenticate the documents Imperial has received via the FOIA requests; and (2) obtain testimony regarding the actual conditions that existed during the underlying inspections. Importantly, Imperial does not seek any information that may be protected by the deliberative process privilege or any other privilege. The specific

depositions Imperial seeks as part of this motion are listed in the Motion hereto. (*See also* February 5, 2009 letter from Charles H. Morgan to Karen E. Mock, attached hereto as Exhibit “B”).¹ Complainant has refused to consent to these depositions, although it is unclear as to the exact basis for this refusal to consent. (*See* February 9, 2009 Letter from Karen E. Mock to Charles H. Morgan, attached hereto as Exhibit “C”). Indeed, Complainant requested that Imperial produce the FOIA files relating to these proposed depositions, stating that such files are responsive to one or more of Complainant’s discovery requests. (*See id.*) Based upon Complainant’s insistence that the FOIA files are the proper subjects of discovery, Imperial promptly produced said files on February 13, 2009. (*See* February 13, 2009 Letter from Charles H. Morgan to Karen E. Mock, attached hereto as Exhibit “D”). Complainant nevertheless continues to refuse to consent to the depositions regarding these files, and Imperial accordingly files this motion for an order allowing same.

II. ARGUMENT AND CITATION OF AUTHORITY

A. The Review Commission’s Discovery Rules are Broad and Liberally Construed to Allow Discovery of Relevant Information.

Pursuant to 29 C.F.R. § 2200.56(a), depositions are a legitimate and permissible means for gathering information, and in the absence of an agreement between the parties, depositions are permitted following the filing of a motion stating “good and just reasons.” 29 C.F.R. § 2200.56(a). Further, 29 C.F.R. § 2200.52(b) allows for the discovery of “any matter that is not privileged and that is relevant to the subject matter involved in the

¹ Imperial noticed the Buffalo deposition and served subpoenas on the Maryland and Michigan witnesses on the mistaken assumption that Complainant had consented to depositions generally being taken in this action. Complainant has corrected Imperial’s mistaken assumption, and Imperial has since notified Complainant and the subpoenaed witnesses that the proposed depositions will not go forward until and unless permitted by the Review Commission.

pending case.” Notably, “[i]t is not ground for objection that the information or response sought will be inadmissible at the hearing, if the information or response appears reasonably calculated to lead to discovery of admissible evidence, regardless of which party has the burden of proof.” 29 C.F.R. § 2200.52(b). These provisions are nearly identical to that under Federal Rule of Civil Procedure 26(b)(1), which provides that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense” and further clarifies that the information sought “need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1). The breadth of these discovery parameters is well recognized. *See, e.g., Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (Under Rule 26, relevancy is “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.”); *United States v. Holley*, 942 F.2d 916, 924 (5th Cir. 1991) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)) (“[T]he deposition-discovery rules are to be accorded a broad and liberal treatment.”).

Assuming a request fits within this broad definition of discoverability, it shall only be limited to the extent (1) the discovery is “unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity to obtain the information sought by discovery in the action; or (3) the discovery is unduly burdensome or expensive, taking into account the needs of the case, limitations on the parties’ resources, and the importance of the issues in litigation.” 29 C.F.R. § 2200.52(c); *see also* Fed. R. Civ. P. 26(b)(2)(C) (setting forth similar limitations). Because the

depositions at issue in the instant motion are undeniably relevant to subject matter of the instant action and are in no way unreasonable or unduly burdensome, especially in light of the number of citations and size of the proposed penalties at issue here, the Commission should grant Imperial the modest discovery it seeks.

B. The Deposition Testimony of OSHA Investigators is Undeniably Relevant to the Subject Matter Involved in the Pending Case.

As an initial matter, as set out above, Complainant has already conceded via notations in its inspection file, various public statements regarding this matter, and its briefing to date that industry practice is relevant to the instant dispute and that it relied on its own view of industry practice in issuing the citations against Imperial. Even if Complainant had not put industry custom at issue by its own actions, however, the case law is clear that, where general standards are at issue, the standards are given meaning in particular situations by reference to objective criteria, including evidence of industry custom and practice from persons familiar with the industry. *Sec'y of Labor v. Siemens Energy & Automation, Inc.*, 20 O.S.H. Cas. (BNA) 2196, 2005 O.S.H.D. (CCH) ¶ 32880 (2005) (explaining that 1910.217(e)(1)(i), which requires employer “to establish and follow a program of periodic and regular inspections of his power presses to ensure that all their parts, auxiliary equipment, and safeguards are in a safe operating condition and adjustment” is a broad, performance-based standard which “may be given meaning in particular situations by reference to objective criteria, including the knowledge of reasonable persons familiar with the industry”); *Sec'y of Labor v. Brooks Well Servicing*, 20 O.S.H. Cas. (BNA) 1286, 2002 O.S.H.D. (CCH) ¶ 32,675 (OSHRC 2003) (because the phrase (in the former version of 1910.36(b)) “‘exits sufficient to permit the prompt escape’ does not state with specificity what an employer must do to comply with the

standard, we apply the well-established principle that a broadly-worded regulation may be given meaning in a particular situation by reference to objective criteria, including the knowledge and perception of reasonable persons knowledgeable about the industry”). Here, having alleged numerous violations of the broad housekeeping standard set forth at 29 C.F.R. § 1910.22(a)(1) and (2), as well as other standards the violation of which hinges upon the apparently elusive definition of a “hazardous accumulation” of dust, Complainant cannot deny that evidence of industry practice is relevant and admissible in determining whether violations have occurred, let alone deny that such evidence is discoverable. *See, e.g., Sec’y of Labor v. Cincinnati Gas & Elec. Co.*, 2002 O.S.H.D. (CCH) ¶ 32622 (2002) (“The Secretary agreed at the outset of the hearing that § 1910.22(a)(1) is a general standard, for which the Secretary bears the burden of proving the cited conditions created a hazard”).

That Imperial seeks to discover facts relating to industry recognition from Complainant’s compliance officers is entirely appropriate. The Review Commission has frequently allowed testimony from compliance officers regarding their recollection of inspections to serve as a basis for industry standards and recognition. *See, e.g., Sec’y of Labor v. Trinity Indus., Inc.*, 15 O.S.H. Cas. (BNA) 1481, 1992 O.S.H.D. (CCH) ¶ 29582 (1992) (relying on the testimony of an experienced OSHA compliance officer in determining whether those in the industry recognize the hazard and how they deal with the hazard); *Sec’y of Labor v. Lukens Steel Co.*, 10 O.S.H. Cas. (BNA) 1115, 1981 O.S.H.D. (CCH) ¶ 25742 (1981) (“In our view, the most compelling evidence in this record relevant to the application of the reasonable person test is the uncontradicted testimony of [OSHA compliance officer] . . .”). While Complainant may attempt to rely

on the anecdotal and hearsay testimony of what its own view of industry practice and knowledge may be, Imperial believes that the specific testimony of what was actually witnessed and documented by Complainant's own photographs from 2004 through 2007 is more appropriate and likely more accurate than anecdotal memory. *Cf. Sec'y of Labor v. Keating Bldg. Corp.*, 21 O.S.H. Cas. (BNA) 1513, n.3 (OSHRC ALJ 2006) (Secretary's proposed expert on industry practice in the cast-in-place concrete construction industry not allowed to testify because of his lack of any actual hands-on involvement in an active concrete project). Accordingly, in an effort to determine industry custom which, as set forth above, is clearly relevant to the instant action, Imperial seeks specific, limited discovery in the form of depositions of certain OSHA and state plan compliance officers. In these depositions, Imperial seeks to discover what was seen at other inspections where there appear to have been large dust accumulations, whether the dust present in these inspections was in fact combustible, and the level of accumulation actually present at these employer sites.²

² Any reliance by Complainant on *Secretary of Labor v. Seibel Modern Mfg. & Welding Corp.*, 15 O.S.H. Cas. (BNA) 1218, 1991 O.S.H.D. (CCH) ¶ 29442 (1991) is misplaced. In *Seibel*, a manufacturer was cited for violating a standard where comprehensive specifications were available to the company, and the employer's primary defense was that it had not been cited previously for violating that standard. 1991 O.S.H.D. at ¶ 39,678-79. *Id.* The Commission found that the Secretary was not precluded from pursuing a citation simply because a prior investigation of that same employer did not result in a citation. *Id.* at 39,681. This determination has no bearing on the present issue, namely whether evidence of how the industry as a whole interprets the vague and general standards on combustible dust is relevant and thus discoverable. Indeed, in the principal case relied on by *Seibel*, *Lukens Steel Co.*, the Secretary specifically relied on industry practice in determining whether an employer failed to comply with the standard at issue and even employed an OSHA officer to testify about industry practice. *Lukens Steel Co.*, 1981 O.S.H.D. at 32,119. Further, Review Commission decisions decided after *Seibel* have explicitly recognized the relevance of both industry practice as well as a pattern of administrative enforcement. *See, e.g., Sec'y of Labor v. Latite Roofing & Sheet Metal Co.*, 2005 O.S.H.D. (CCH) ¶ 32858 (2005) (noting that "common practice" and OSHA's

C. The Requested Discovery is Entirely Reasonable Under 29 C.F.R. § 2200.52(c).

Having established the relevancy of the requested deposition testimony, pursuant to 29 C.F.R. § 2200.52, Imperial is entitled to such discovery so long as it is not (1) unreasonably cumulative or duplicative, or obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) a matter that Imperial has had ample opportunity to obtain previously; or (3) unduly burdensome or expensive, taking into account the needs of the case, limitations on the parties' resources, and the importance of the issues in litigation. None of these bases for limitation are present here. First, Complainant has already indicated a desire to take forty-five (45) depositions; therefore, it can hardly be said that Imperial's desire to take approximately the same total number of depositions is unduly burdensome. Second, Imperial has sought Rule 30(b)(6) depositions from Complainant, which should serve to ensure efficiency. Indeed, Imperial has indicated that the requested depositions will be kept at or under three (3) hours in duration. Third, Imperial has worked diligently during Complainant's investigation to obtain information regarding industry practice via FOIA requests, and seeks the instant depositions because the additional information and authentication needed cannot be obtained elsewhere. Finally, Imperial respectfully submits that the discovery sought via the instant motion is entirely reasonable, especially in light of the numerous citations at issue and the sheer size of the penalties proposed, and should therefore be granted.

pattern of enforcement are relevant to fair notice defense).

III. CONCLUSION

For the foregoing reasons, Imperial respectfully requests that the Review Commission enter an order permitting certain depositions of OSHA compliance officers.

Respectfully submitted this 5th day of March 2009.

/s/ Charles H. Morgan

Charles H. Morgan

charlie.morgan@alston.com

Matthew J. Gilligan

matt.gilligan@alston.com

Ashley D. Brightwell

ashley.brightwell@alston.com

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,)	
)	
Complainant,)	OSHRC Docket No. 08-1104
)	
v.)	
)	
IMPERIAL SUGAR COMPANY;)	
IMPERIAL-SAVANNAH, L.P.)	
)	
)	
Respondents.)	
_____)

ORDER PERMITTING DEPOSITIONS OF OSHA COMPLIANCE OFFICERS
(Proposed)

Pursuant to 29 C.F. R. § 2200.56(a) and for good cause shown, Respondents' Motion to Depose OSHA Compliance Officers is hereby GRANTED, and Respondents are permitted to take the depositions listed in the Motion. Such depositions shall be limited to no more than three (3) hours each in duration and shall be taken at times and locations convenient to the parties and the witnesses. Pursuant to 29 C.F.R. § 2200.56(c), said depositions may be taken after ten days' written notice to Complainant.

SO ORDERED this ____ day of _____, 2009.

The Honorable Covette Rooney
U.S. OSHRC Judge

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,)	
)	
Complainant)	
)	
v.)	Docket No. 08-1104
)	
IMPERIAL SUGAR COMPANY;)	
IMPERIAL-SAVANNAH, L.P.)	
)	
Respondents.)	

CERTIFICATE OF SERVICE

I certify that all parties have consented that all papers required to be served in this action may be served and filed electronically. I further certify that a copy of RESPONDENTS' MOTION TO DEPOSE OSHA COMPLIANCE OFFICERS, MEMORANDUM IN SUPPORT, PROPOSED ORDER, and EXHIBITS A, B, C, and D were served via UPS Next Day Air¹ on March 5, 2009 on the following counsel for Complainant:

Karen E. Mock
Mock.Karen@dol.gov
Angela F. Donaldson
Donaldson.Angela@dol.gov
Office of the Solicitor
U.S. Department of Labor
61 Forsyth Street S.W.
Room 7T10
Atlanta, Georgia 30303

/s/ Charles H. Morgan
Charles H. Morgan
Alston & Bird LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
charlie.morgan@alston.com

¹ Respondent attempted to file and serve by email, but received an error message that the data on the exhibits exceeded the system limits.

*Secretary of Labor v. Imperial Sugar Company and
Imperial-Savannah, L.P.*

OSHRC Docket No. 08-1104

Respondents' Motion to Depose OSHA
Compliance Officers

The Hon. Covette Rooney

Exhibit A

Declaration of Lina Locke Watson

Served via UPS Next Day Air on CD
on March 5, 2009

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,)	
)	
Complainant,)	Docket No. 08-1104
)	
v.)	
)	
IMPERIAL SUGAR COMPANY;)	
IMPERIAL-SAVANNAH, L.P.)	
)	
)	
Respondents.)	
<hr/>		

DECLARATION OF LINA LOCKE WATSON

I, Lina Locke Watson, state as follows:

1.

I am employed by Alston & Bird LLP as a paralegal. I have personal knowledge of the facts in this declaration. One of my responsibilities in my position has been to receive and maintain copies of files obtained from Occupational Safety and Health Administration offices and state plan occupational safety agencies in response to certain requests by our office.

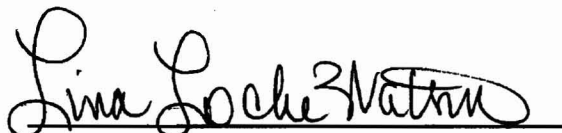
2.

Attached hereto as Attachment 1 are true and correct copies of photographs Alston & Bird LLP has received from various area offices of the Occupational Safety and Health Administration or state plan occupational safety agencies, which were produced with files related to inspections by those agencies. The photographs are labeled by inspection.

3.

Attached hereto as Attachments 2 and 3 are excerpts from a file received by Alston & Bird LLP from the OSHA Buffalo Area Office related to Inspection No. 312308117 of U.S. Sugar in Buffalo, New York.

Pursuant to 28 U.S.C. § 1746, I hereby affirm that I am over 18 years of age and am competent to make the foregoing declaration and I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on the 4th day of March, 2009.


LINA LOCKE WATSON

*Secretary of Labor v. Imperial Sugar Company and
Imperial-Savannah, L.P.*

OSHRC Docket No. 08-1104
Respondents' Motion to Depose OSHA
Compliance Officers

The Hon. Covette Rooney

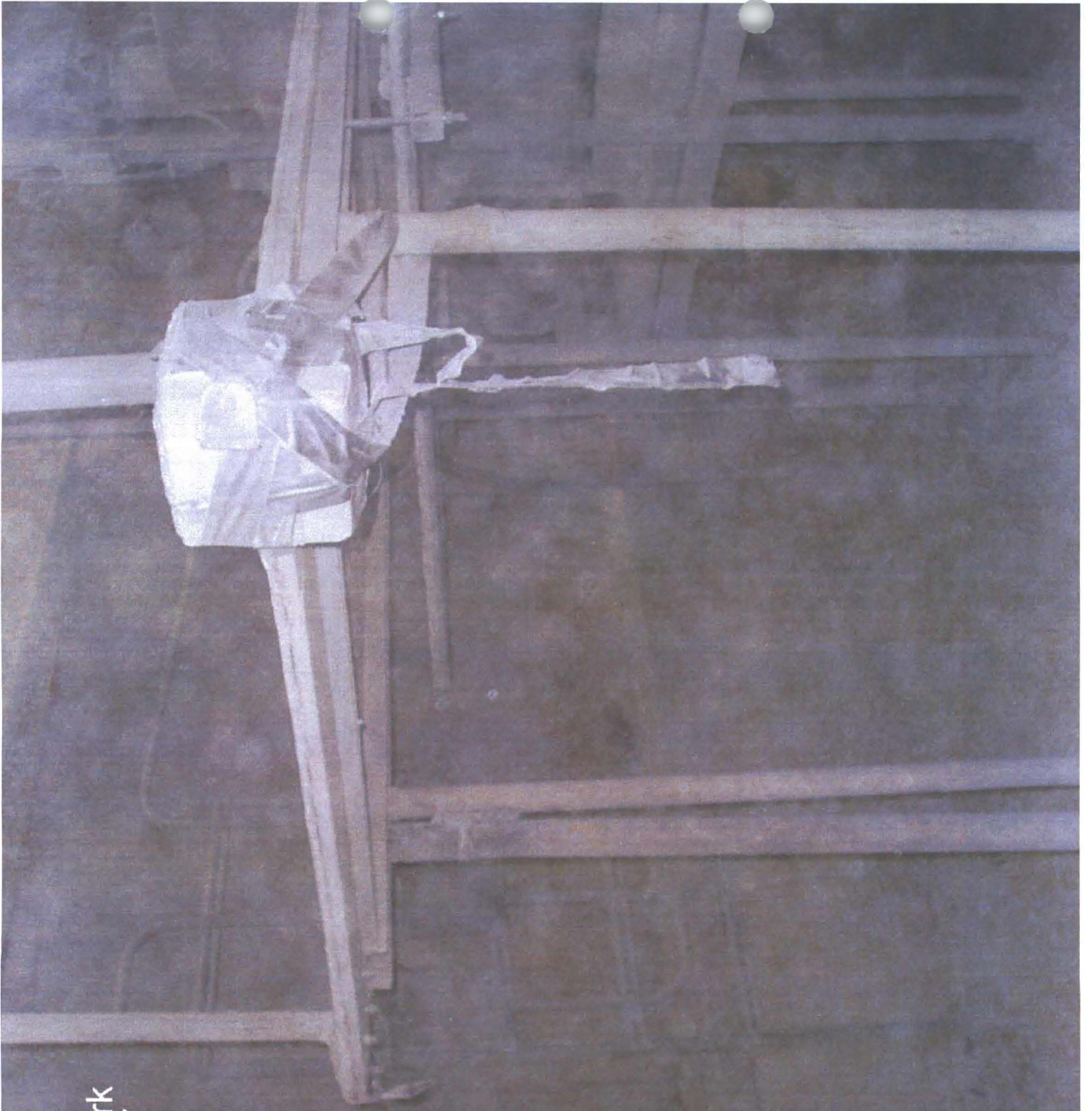
Attachment 1 to Exhibit A
Photographs of FOIA Inspections

Served via UPS Next Day Air on CD
on March 5, 2009

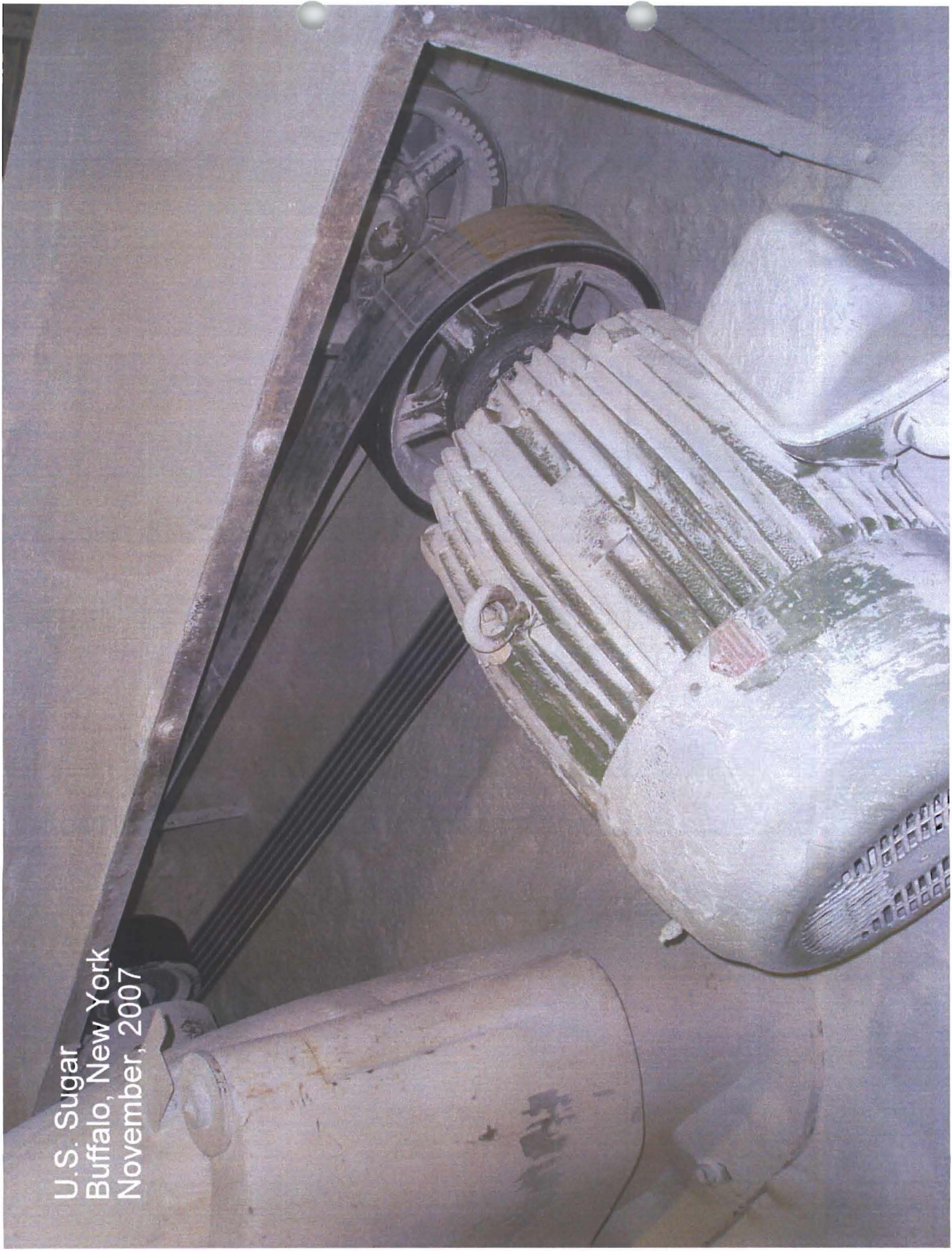
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Buffalo, New York
November, 2007



U.S. Sugar
Buffalo, New York
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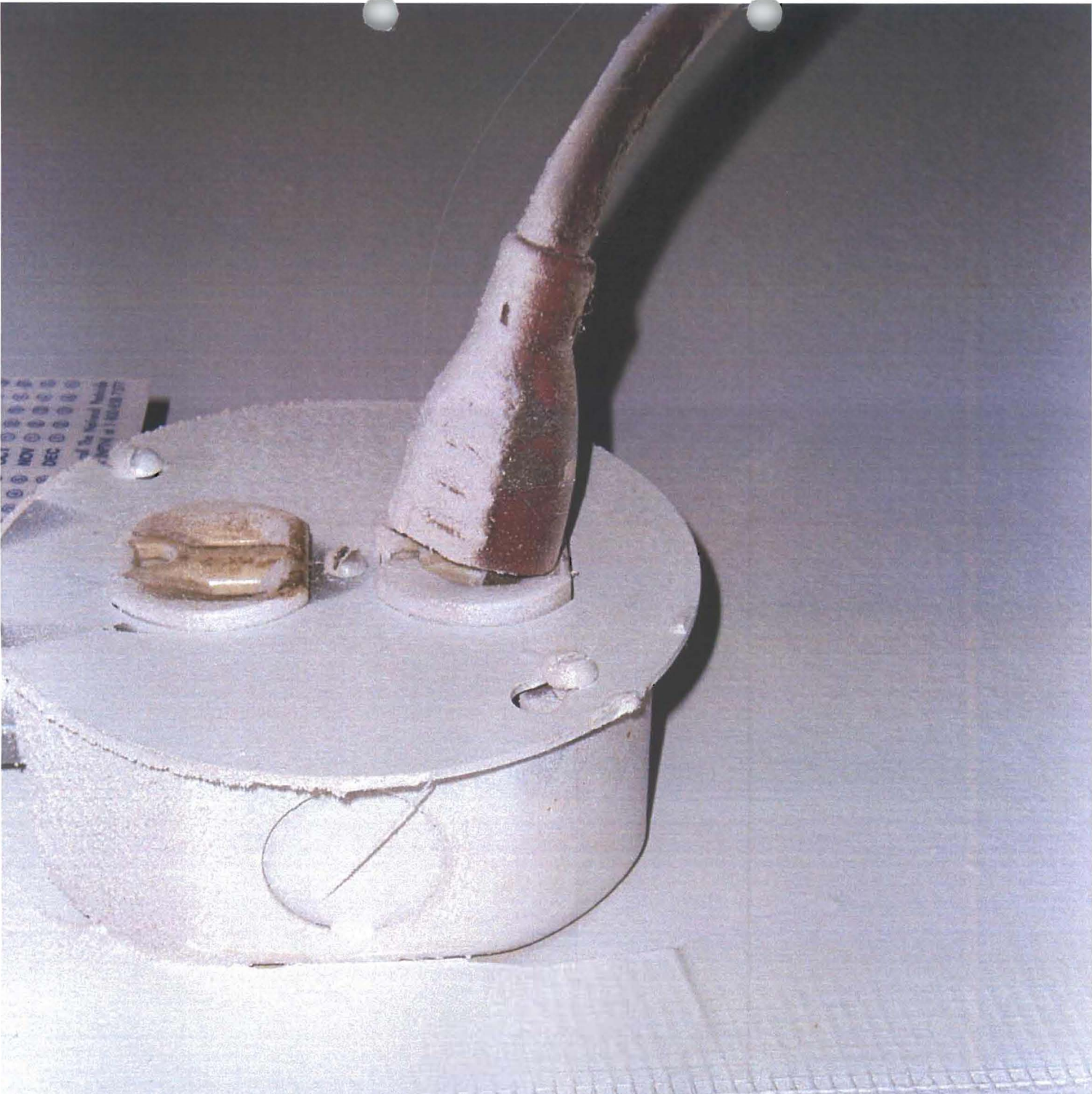


U.S. Sugar
Buffalo, New York
November, 2007





US Sugar
Buffalo, New York
November, 2007



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NIDDK
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U.S. Sugar
Buffalo, New York
November, 2007

US Sugar
Buffalo, New York
November, 2007



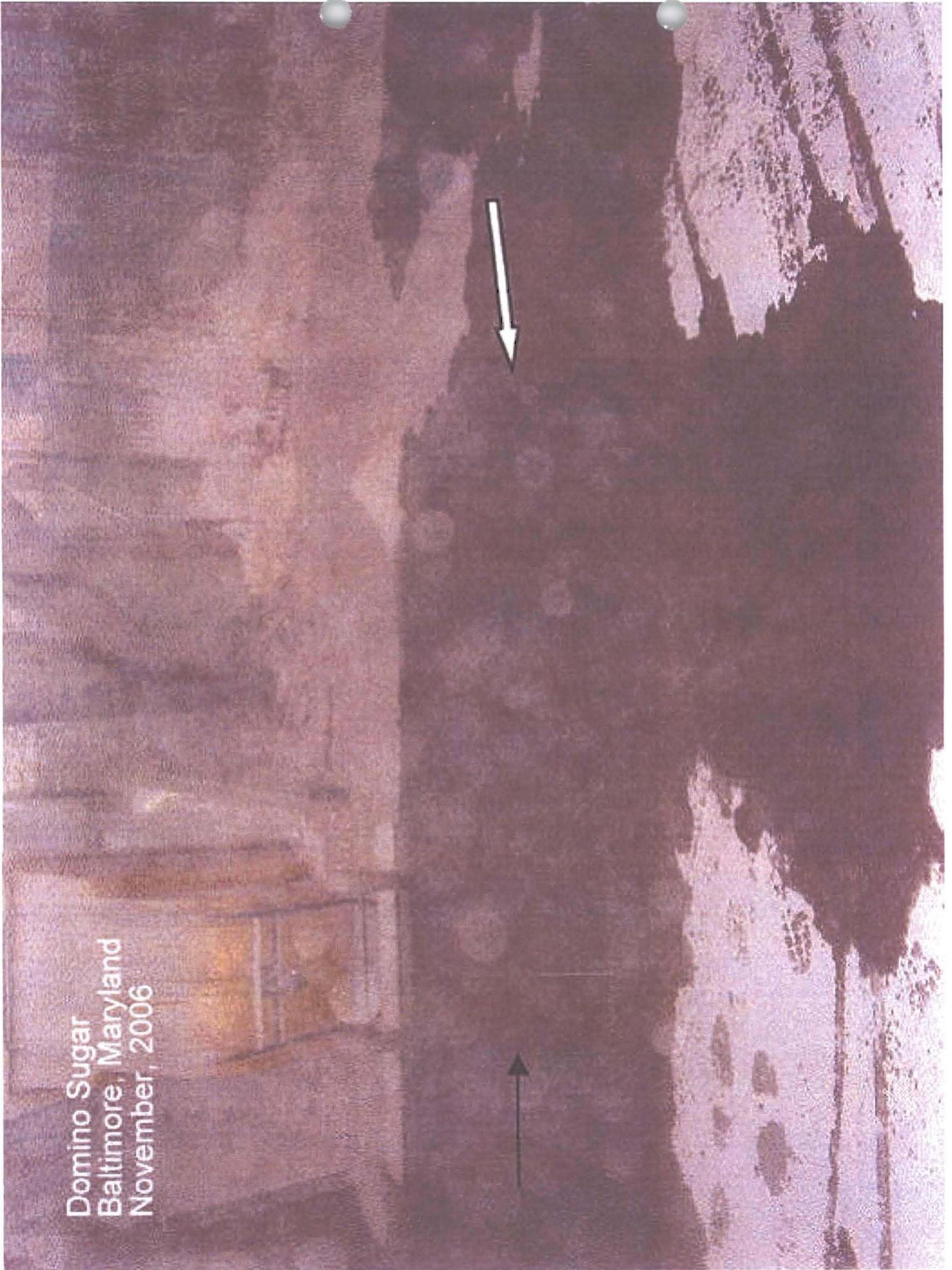
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SAMPLE STORAGE

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November, 2006



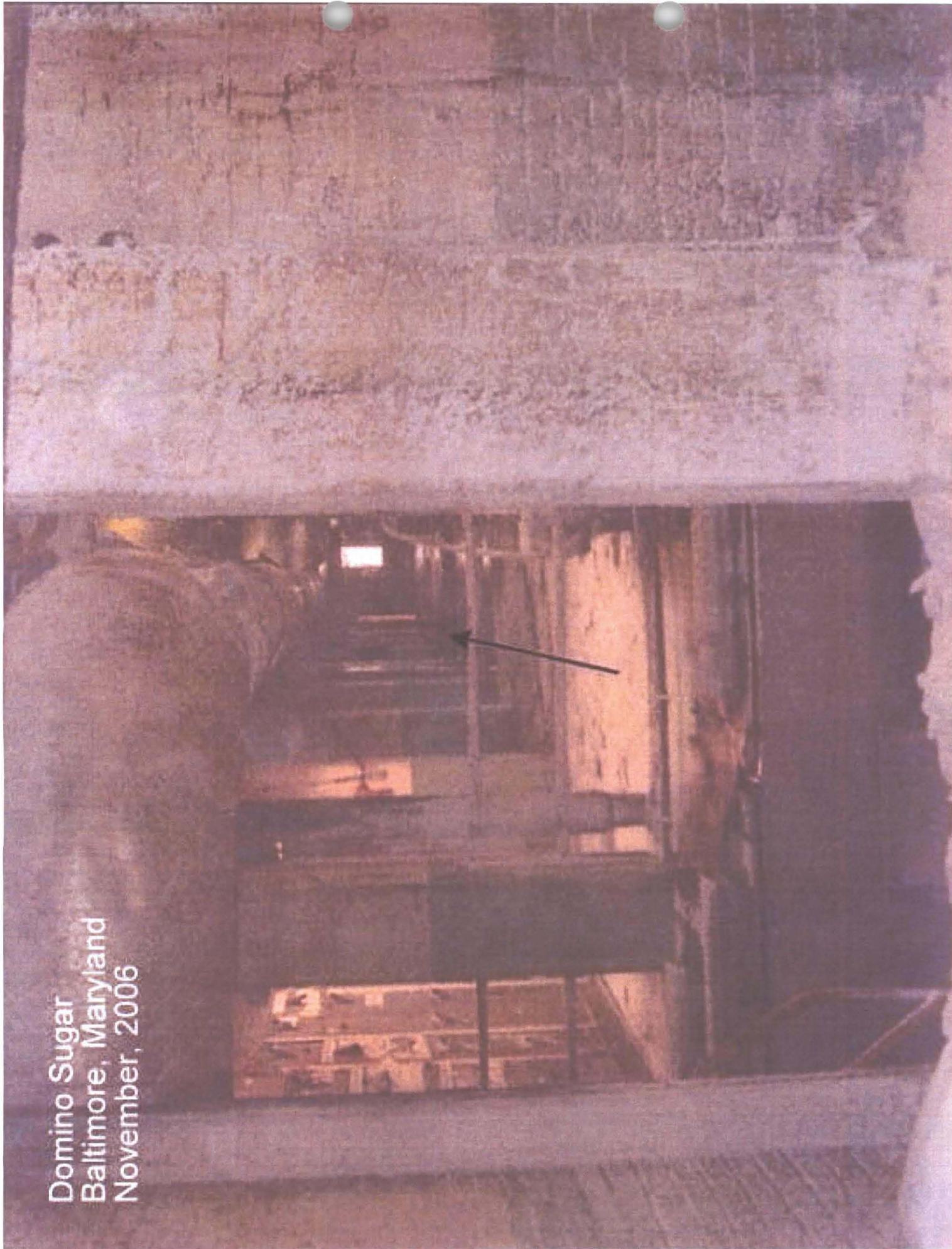
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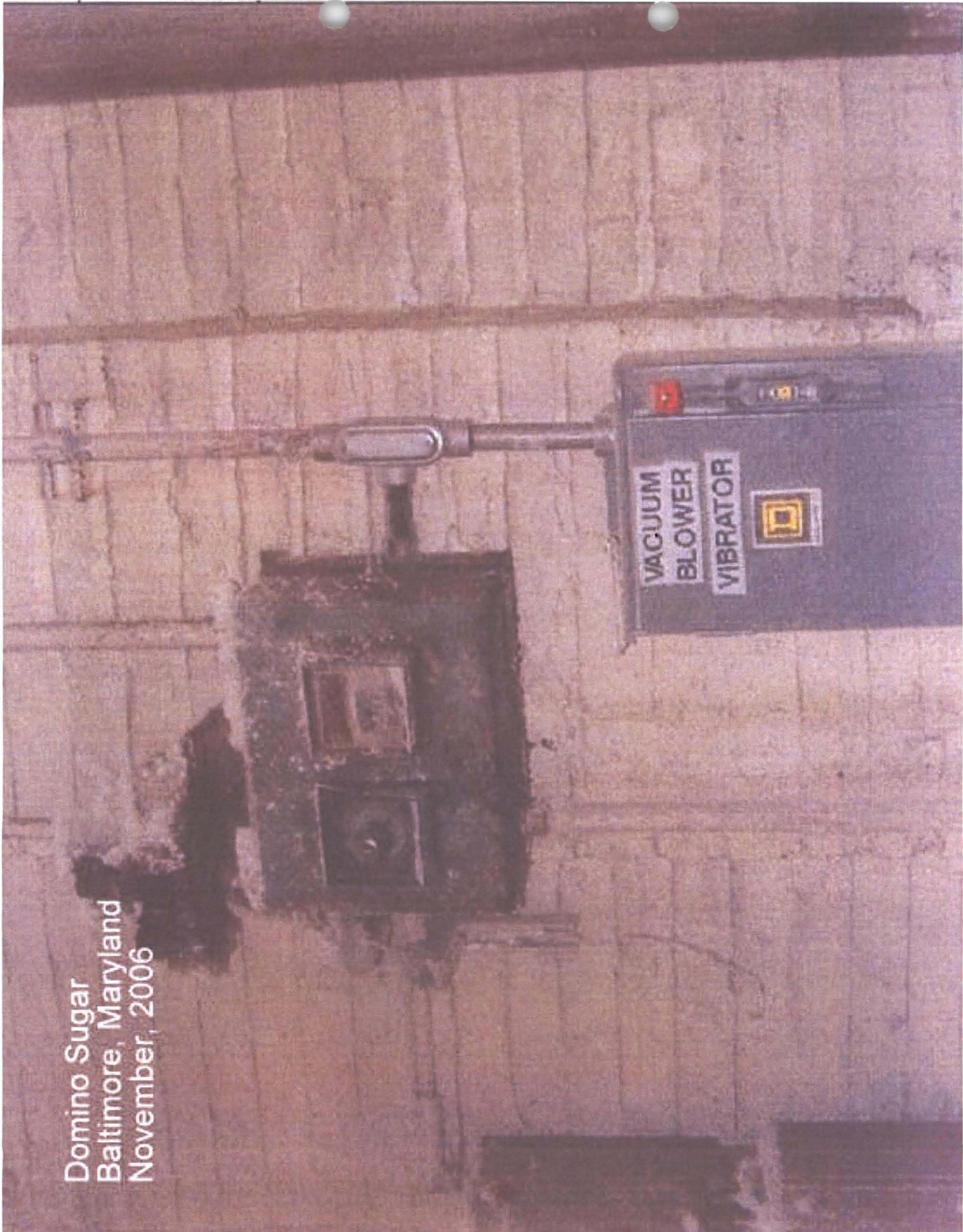
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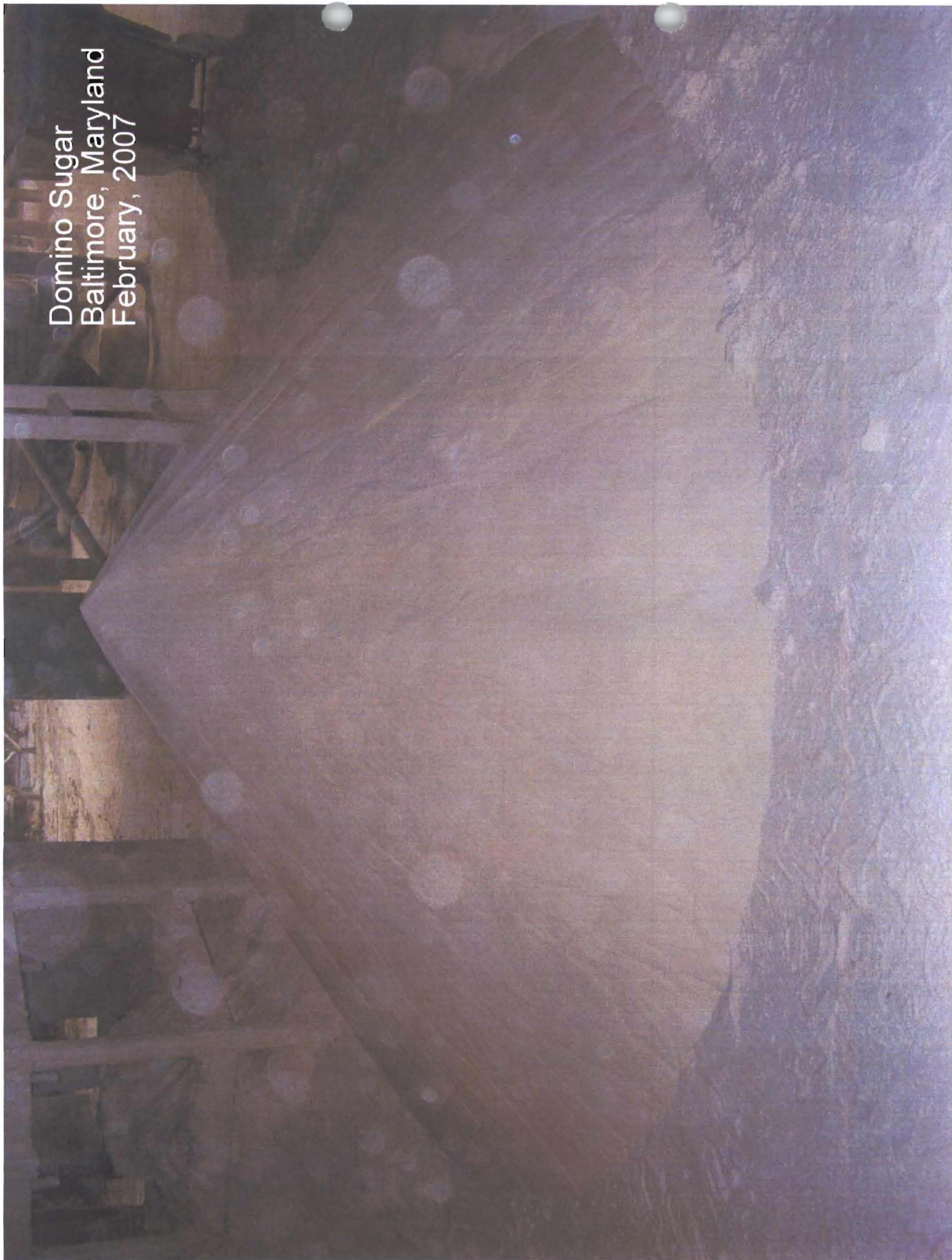
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February, 2007



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February, 2007

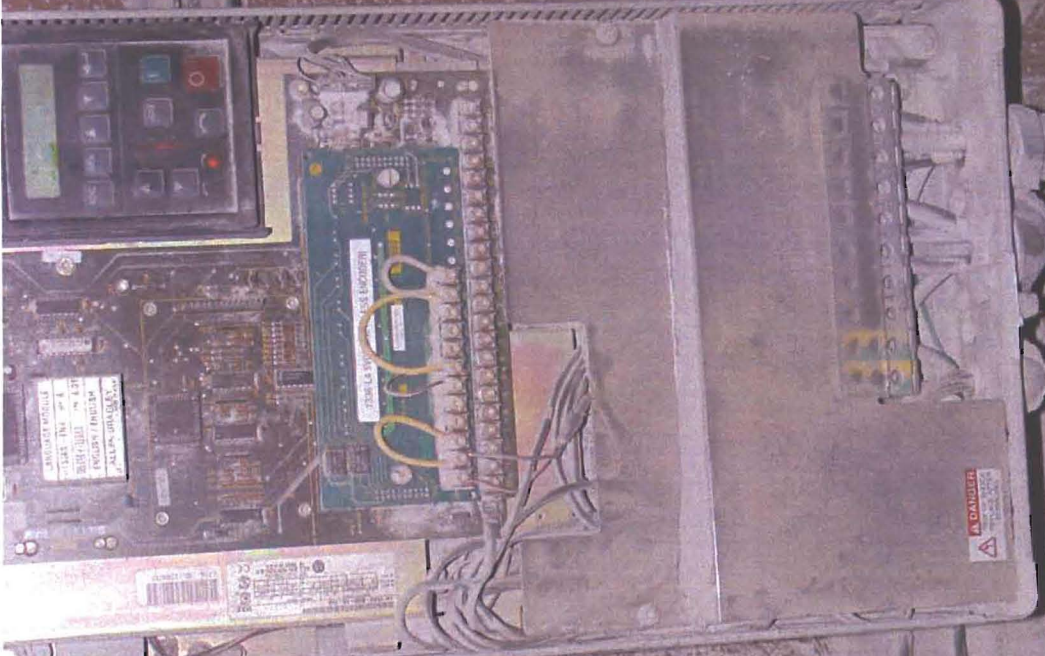


Americane Sugar Refining LLC
Taylor, Michigan
March, 2007



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March, 2007



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March, 2007

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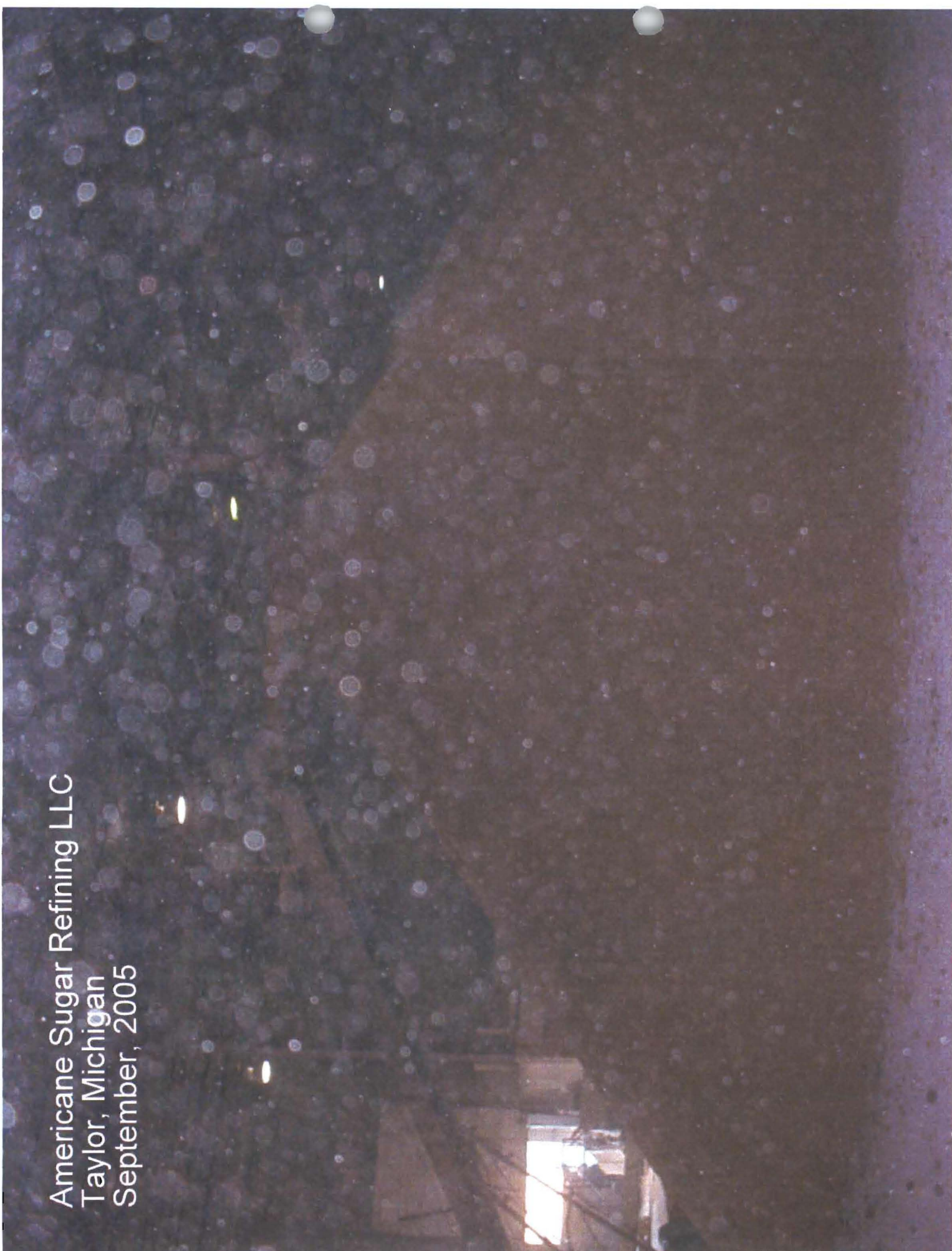




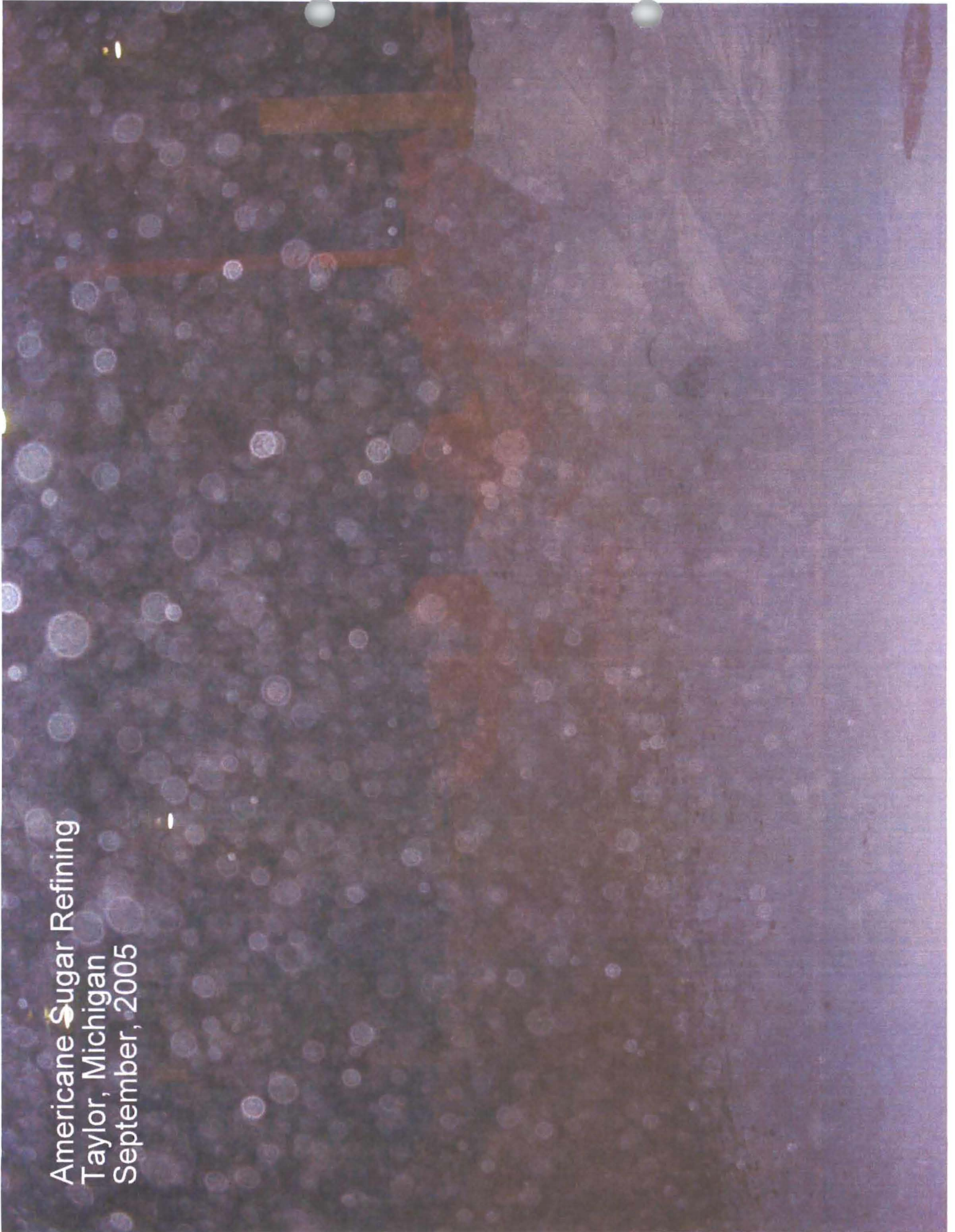
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Domino Sugar
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September, 2004

ROTEX
SCREENERS

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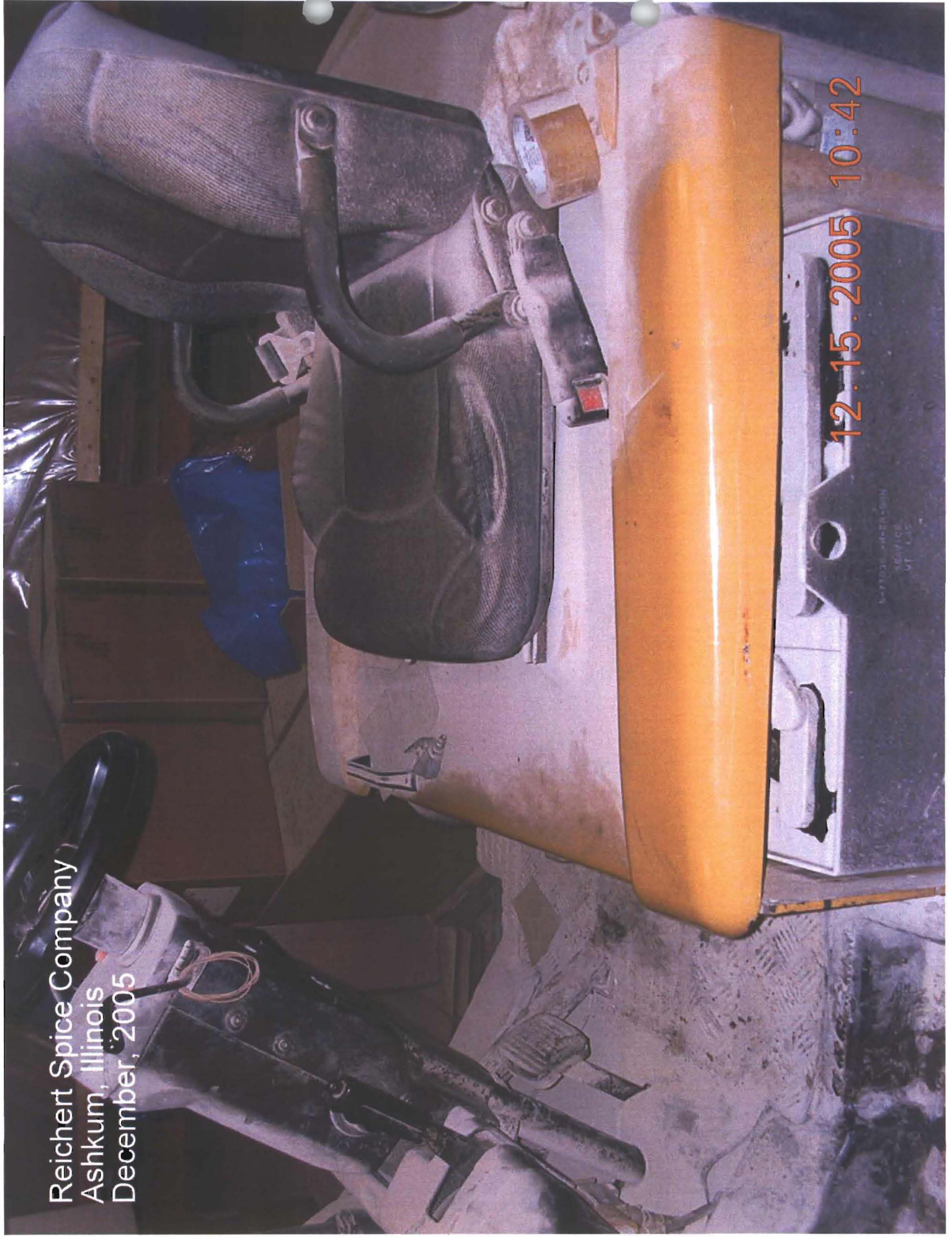
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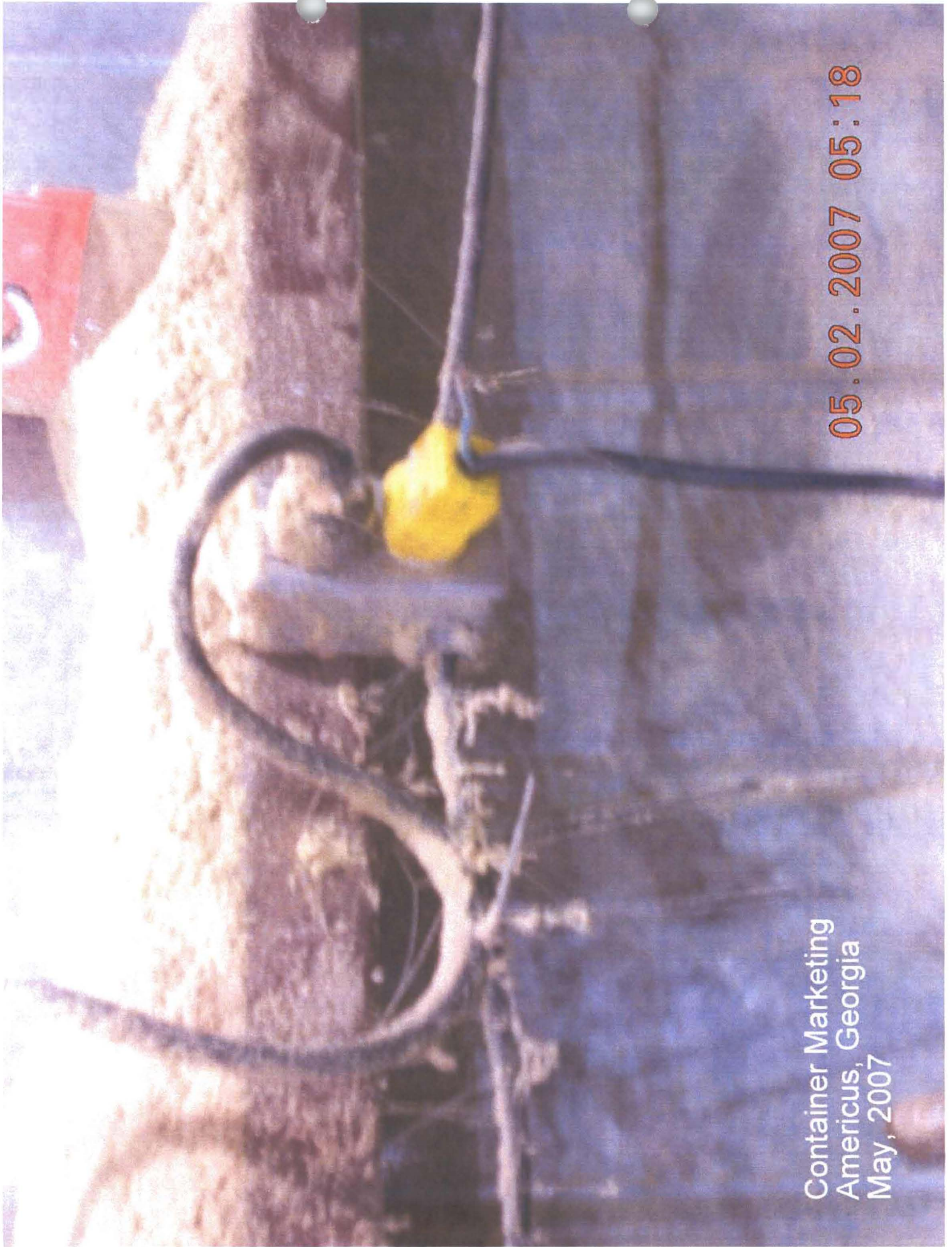
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December 2005

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Container Marketing
Americus, Georgia
May, 2007

05.02.2007 05:19





Container Marketing
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May, 2007

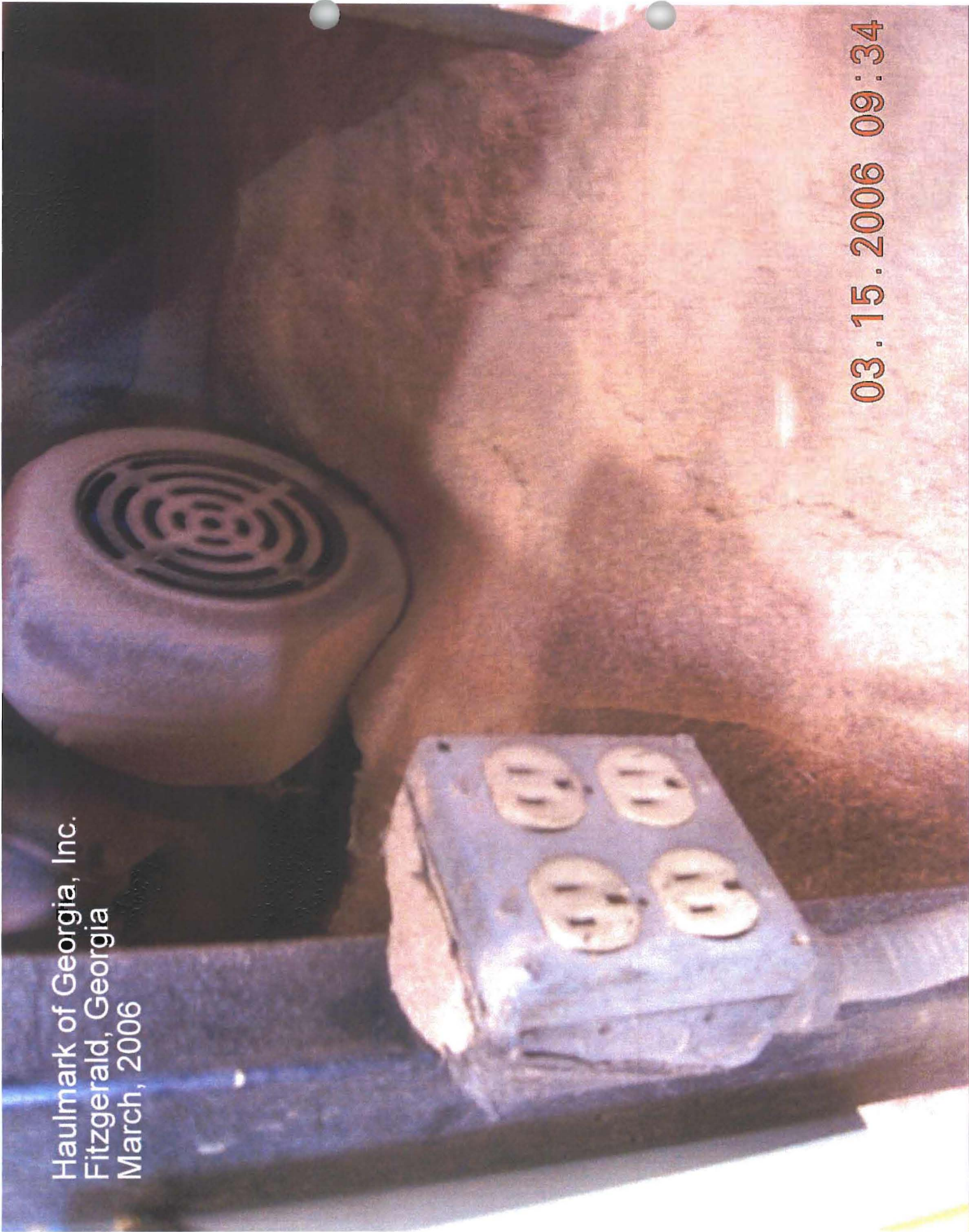
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March, 2006

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Haulmark of Georgia, Inc.
Fitzgerald, Georgia
March, 2006

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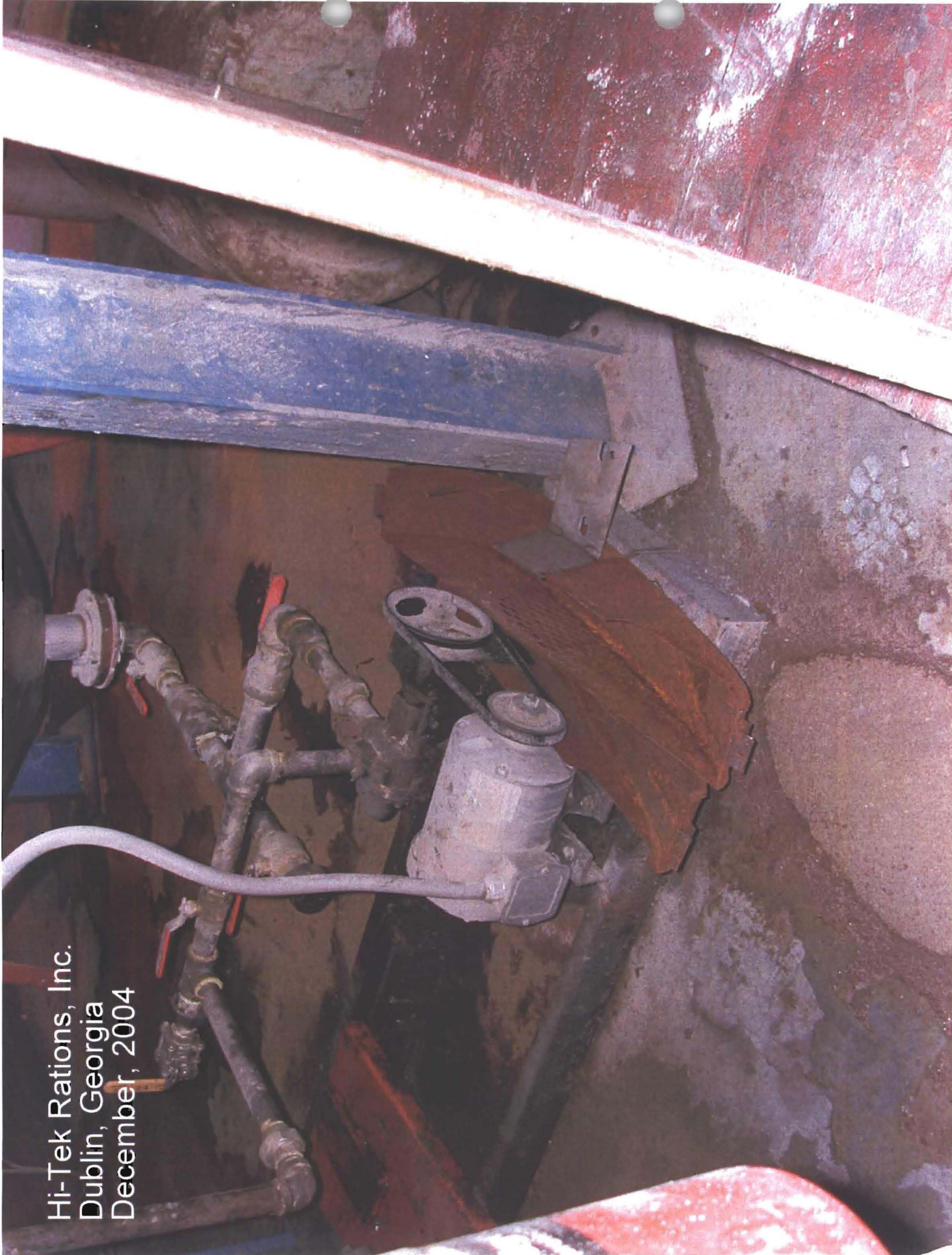


Haulmark of Georgia, Inc.
Fitzgerald, Georgia
March, 2006

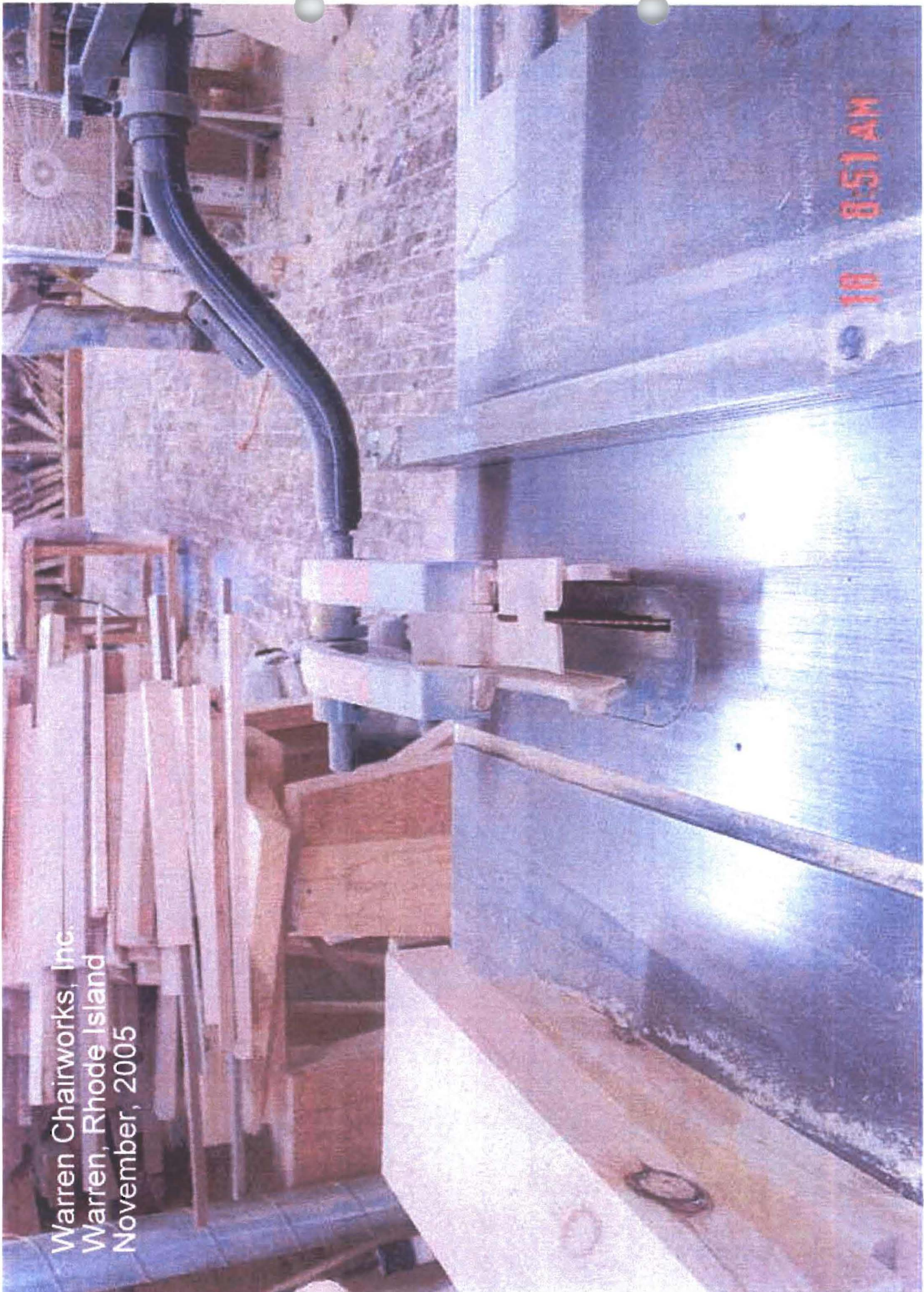


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Dublin, Georgia
December, 2004



Warren Chairworks, Inc.
Warren, Rhode Island
November, 2005





Warren Ch...works, Inc.
Warren, Rhode Island
November, 2005

*Secretary of Labor v. Imperial Sugar Company and
Imperial-Savannah, L.P.*

OSHRC Docket No. 08-1104

Respondents' Motion to Depose OSHA
Compliance Officers

The Hon. Covette Rooney

Attachment 2 to Exhibit A
Portion of U.S. Sugar Citation, Buffalo, New York

Served via UPS Next Day Air on CD
on March 5, 2009

U.S. Department of Labor
Occupational Safety and Health Administration

Inspection Number: 312308117
Inspection Dates: 07/01/2008 - 09/24/2008
Issuance Date: 09/25/2008



Citation and Notification of Penalty

Company Name: U.S. SUGAR CO., INC.
Inspection Site: 692 Bailey Avenue, Buffalo, NY 14240

Citation 1 Item 3 Type of Violation: Serious

29 CFR 1910.22(a)(1): Place(s) of employment were not kept clean and orderly, or in a sanitary condition:

- a) On or about 7/1/08 on the third floor of the process area; dust accumulation on the support structures for Silo 2 & 3, overhead walkway between Silo 1, 2, and 3, and other flat surfaces was greater than 1/32" and required cleaning.

NO ABATEMENT DOCUMENTATION REQUIRED



Citation 1 Item 4 Type of Violation: Serious

675.00

29 CFR 1910.147(d)(4)(i): Lock out or tagout devices were not affixed to each energy isolating device by authorized employees:

- a) On or about 8/14/08 in the first floor packout area; two employees were trouble shooting the control panel for Line 53 and neither employee had applied a lock out or tag out device to the local disconnect.

NO ABATEMENT DOCUMENTATION REQUIRED



675.00

See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

*Secretary of Labor v. Imperial Sugar Company and
Imperial-Savannah, L.P.*

OSHRC Docket No. 08-1104

Respondents' Motion to Depose OSHA
Compliance Officers

The Hon. Covette Rooney

Attachment 3 to Exhibit A
Portion of U.S. Sugar Inspection File
Buffalo, New York

Served via UPS Next Day Air on CD
on March 5, 2009



SAFETY NARRATIVE

Inspection Number: 312308117

COVERAGE INFORMATION

Employer purchased pneumatic product conveying system from a company located in SC.

NATURE AND SCOPE

Check Applicable Boxes and Explain Findings:

Planned Inspection

NEP - Dust (03-00-008)

NATURE AND SCOPE -- UNUSUAL CIRCUMSTANCES (Mark X and explain all that apply:)

None

OPENING CONFERENCE NOTES:

Entered establishment and spoke with [redacted] CSHO's [redacted] presented credentials and explained purpose and scope of visit (NEP Combustible Dust), and received permission to continue. CSHO asked for OSHA 300 logs, 301, 300A and C-2 forms or equivalent, HazCom and LOTO programs, and any other written safety and health program, procedures, or rules the employer has that is required by OSHA regulations.

US Sugar is a small company that processes raw cane and beet sugar producing sugar, brown sugar and powdered sugar for companies to be sold under private labels in retail outlets, e.g. Wal Mart and Tops grocery stores. Sugar is delivered via bulk rail cars (200,000#) and bulk trucks and unloaded on site. Using mechanical (bucket elevators and screw conveyors) as well as a pneumatic conveying systems the sugar is moved through the facility. The pneumatic system was installed in 2007 and is used on a limited basis due to its inherent abrasive nature on the sugar.

Approximately nine dust and product collectors are used throughout the various transfer and milling systems to capture dust and classify the various sugar products and raw materials. All but one of these devices are located inside and only one of these are vented to the outside. NFPA 61 2007 Edition Standard for the Prevention of Fires and Dust Explosions in Agricultural and Food Processing Facilities was used as a resource to identify safety deficiencies within the facility.

The facility is sprinklered and consists of three floors of approximately 8-9,000 sq. feet each with adjoining storage areas on each level. An attached enclosed rail car unloading facility, large enough to accommodate two rail cars, is also used to unload bulk sugar trucks via the pneumatic system. The majority of the sugar used at the facility is delivered by rail using gravity unloading into a screw conveyor and bucket elevator system. All bucket elevators used at the facility have belt speeds below the 500 ft/min exempting them from explosion venting requirements described in NFPA 61.

While bonding and grounding is used on most process and transfer equipment to address the concerns of static discharge, there is no ongoing program to verify the integrity of these actions. CSHO's recommended to the employer, that a regular testing and inspection program be established to verify the facilities bonding and grounding efforts.

HAZARD COMMUNICATION PROGRAM

Written Program (complete)

Yes No

MSDS's (all)

Yes No

*Secretary of Labor v. Imperial Sugar Company and
Imperial-Savannah, L.P.*

OSHRC Docket No. 08-1104

Respondents' Motion to Depose OSHA
Compliance Officers

The Hon. Covette Rooney

Exhibit B

February 5, 2009 letter from Charles H. Morgan to
Karen E. Mock

Served via UPS Next Day Air on CD
on March 5, 2009

ALSTON & BIRD LLP

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Charles H. Morgan

Direct Dial: 404-881-7187

E-mail: charlie.morgan@alston.com

February 5, 2009

Via Email

Karen E. Mock, Esq.
Office of the Solicitor
U.S. Department of Labor
61 Forsyth Street, SW, Room 7T10
Atlanta, Georgia 30303

Re: *Secretary of Labor v. Imperial-Savannah, L.P. et al*,
OSHRC Docket No. 08-1104

Dear Karen:

Enclosed is a notice of a Rule 30(b)(6) deposition of Complainant's representative relating to the Complainant's inspection of U.S. Sugar Co., Inc., 692 Bailey Avenue, Buffalo, New York 14240. In the notice, I have proposed a date of Wednesday, February 18, 2009, but we are certainly flexible as to dates. After you look at your schedules, please let me know what is convenient.

Attached is a list of other depositions we would like to take in the near future. All of these depositions relate to inspections by Complainant or state plan agencies of industries identified by Complainant as likely to have hazards of combustible dust present in the workplace. I will be serving subpoenas on the individuals employed by Michigan and Maryland, and will work with you and the deponents to find mutually convenient dates for the depositions. I will shortly propose dates for all of these depositions. I do not expect any of the depositions, including the deposition in Buffalo, to exceed three hours, and I will attempt to keep them as short as possible.

We have earlier corresponded regarding these depositions and I understand that the Complainant does not agree that these depositions are appropriately within the scope of discovery. As an initial matter, we believe the party opposing discovery has the burden to establish that the discovery sought is not likely to lead to the discovery of admissible evidence or is otherwise not permissible.

To be clear, we are not seeking information in these depositions that may be protected by any privilege, including the deliberative process privilege. Instead, we are interested in the facts observed during the subject inspections and seek to authenticate the documents we have received

Karen E. Mock, Esq.
February 5, 2009
Page 2

from OSHA and state plan agencies. Based on our review of the files we have received from OSHA, we believe the evidence sought not only will lead to the discovery of admissible evidence, but is directly relevant to the claims and defenses in this case for a number of reasons, including as follows: (1) because several of the standards at issue are general standards, evidence from other employers regarding how employers comply with the standards is relevant, and indeed an element of the Secretary's burden in establishing a violation; (2) evidence of enforcement history and/or the industry's or other employers' understanding of what is a violation is an element of the Secretary's burden in establishing fair notice of an interpretation of the standards at issue; (3) evidence of interpretations of the standards at issue, both by industry and by OSHA, is relevant to the Secretary's burden in proving violations; (4) evidence of interpretations of the standards at issue are relevant to the Secretary's burden in establishing "egregious" violations and willful violations; and (5) evidence of interpretations of the standards at issue are relevant to whether the standards at issue are unconstitutionally vague as applied.

Pat Veters and I plan to take these depositions together for the purposes of both the Port Wentworth and Gramercy matters, so as not to duplicate efforts. Accordingly, I am copying Mike Schoen on this notice.

Please let us know if you have questions. Thank you.

Sincerely,

/s/ Charlie Morgan

Charles H. Morgan

CHM:chm
Enclosures (Notice of Deposition and Deposition List)

cc: Angela F. Donaldson, Esq. (w/encl.)
Michael D. Schoen, Esq. (w/encl.)
Patrick J. Veters, Esq. (w/encl.)
Matthew J. Gilligan, Esq. (w/encl.)

LEGAL02/31105677v2

DEPOSITION LIST

Date	Location	Deponent
February 18, 2009	Buffalo, New York	Rule 30(b)(6) Designee for OSHA Inspection No. 311614143 and Inspection No. 312308117, Inspection Site: U.S. Sugar Co., Inc., 692 Bailey Avenue, Buffalo, NY 14240.
	Baltimore, MD	Terre Neil, Maryland OSHA, Region II, 1131 Bel Air Road, LL1, Bel Air, Maryland 21014.
	Baltimore, MD	Raj Janack, Maryland OSHA, Region III, 1100 North Eutaw Street, Room 611, Baltimore, MD 21201.
	Lansing, Michigan	Kevin Gilday, Michigan OSHA, State Secondary Complex - General Office Bldg, 7150 Harris Drive, Dimondale, MI 48821.
	Lansing, Michigan	Jim Hensley, Michigan OSHA, State Secondary Complex - General Office Bldg, 7150 Harris Drive, Dimondale, MI 48821.
	Lansing, Michigan	Matt Macomber, Michigan OSHA, State Secondary Complex - General Office Bldg, 7150 Harris Drive Dimondale, MI 48821.
	Tarrytown, New York	Rule 30(b)(6) Designee for OSHA Inspection No. 307660977, Inspection Site: American Sugar Refining, One Federal Street, Yonkers, NY 10702.
	Savannah, Georgia	Rule 30(b)(6) Designee for OSHA Inspection No. 307406405, Inspection Site: Hi-Tek Rations, Inc., 2004 Waldrep Industrial Boulevard, Dublin, GA 31040.
	Savannah, Georgia	Rule 30(b)(6) Designee for OSHA Inspection No. 307414763, Inspection Site: Container Marketing, Inc. 110 Matthews Drive Americus, GA 31709.
	Savannah, Georgia	Rule 30(b)(6) Designee for OSHA Inspection No. 307410555, Inspection Site: Haulmark of Georgia, Inc. 122 Glenn Bass Road Fitzgerald, GA 31750.

	Peoria, Illinois	Rule 30(b)(6) Designee for OSHA Inspection No. 308570175, Inspection Site: Reichert Spice Company, Inc., 2696 North 900 East Road, Ashkum, IL 60911.
	Boston, MA	Rule 30(b)(6) Designee for OSHA Inspection No. 308298652, Inspection Site: Vitasoy USA, Inc., 1 New England Way, Ayer, MA 01432.
	Wilkes-Barre, PA	Rule 30(b)(6) Designee for OSHA Inspection No. 307917807, Inspection Site: Bradley Wiles, Inc., Beillench Road, Forksville, PA 18616.
	Columbus, OH	Rule 30(b)(6) Designee for OSHA Inspection No. 310474929, Inspection Site: Tectum, Inc., 105 S. 6 th Street, Newark, Ohio 43215
	Providence, RI	Rule 30(b)(6) Designee for OSHA Inspection No. 307576017, Inspection Site: Warren Chairworks, Inc., 30 Cutler Street, Warren, RI 02885

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,)	
)	
Complainant,)	Docket No. 08-1104
)	
v.)	
)	
IMPERIAL SUGAR COMPANY;)	
IMPERIAL-SAVANNAH, L.P.)	
)	
)	
Respondents.)	
_____)	

NOTICE OF RULE 30(b)(6) DEPOSITION FOR COMPLAINANT

You are hereby notified that, pursuant to 29 C.F.R. § 2200.56 and Fed.R.Civ.P. 30(b)(6), Respondent Imperial-Savannah, L.P. (“Imperial”) will take the deposition upon oral examination of a representative of Complainant at the offices of Paul William Beltz, P.C., 36 Church Street, Buffalo, New York 14202, commencing at 9:00 a.m. on Wednesday, February 18, 2009, and continuing thereafter from time to time and day to day until completed. The deposition will be taken before an officer authorized by law to administer oaths, and will be conducted pursuant to the provisions of the Rules of Procedure of the Occupational Safety and Health Review Commission and the Federal Rules of Civil Procedure for the purpose of discovery, use as evidence at trial, and any other purposes allowed by law. The deposition will be recorded by stenographic means and by videotape.

Pursuant to Fed.R.Civ.P. 30(b)(6) of the Federal Rules of Civil Procedure, Complainant is required to designate one or more employees, agents or other persons to testify on its behalf with respect to the following matters:

- (a) The specific physical conditions found and facts gathered at U.S. Sugar Co., Inc., located at 692 Bailey Avenue, Buffalo, New York 14240 (“Location”), during Inspection No. 311614143, conducted by Complainant on or about November 21, 2007 through December 10, 2007.
- (b) The specific physical conditions found and facts gathered at the Location during Inspection No. 312308117, conducted by Complainant on or about July 1, 2008 through September 24, 2008.
- (c) Authentication of documents in Complainant’s files relating to Inspection No. 311614143 and Inspection No. 312308117, including but not limited to, photographs and videos taken during the course of the inspections or otherwise maintained as part of the inspection files.
- (d) The identities of all Complainant’s employees and agents who have conducted inspections of or otherwise entered the Location at any time since January 1, 2000 through the date of this Notice of Deposition.
- (e) The identities of all of Complainant’s employees and agents who participated in, reviewed or approved the decision to issue the citations regarding the Location with respect to Inspection No. 311614143 and Inspection No. 312308117.

Respectfully submitted this 5th day of February, 2009.

/s/ Charles H. Morgan
Charles H. Morgan
charlie.morgan@alston.com
Matthew J. Gilligan
matt.gilligan@alston.com
Ashley D. Brightwell
ashley.brightwell@alston.com
Jeremy D. Tucker
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Attorneys for Respondents

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,)
)
 Complainant,) Docket No. 08-1104
)
 v.)
)
 IMPERIAL SUGAR COMPANY;)
 IMPERIAL-SAVANNAH, L.P.)
)
 Respondents.)
 _____)

CERTIFICATE OF SERVICE

I certify that all parties have consented that all papers required to be served may be served and filed electronically. I further certify that a copy of the NOTICE OF RULE 30(b)(6) DEPOSITION FOR COMPLAINANT was electronically served on February 5, 2009 on the following counsel:

Karen E. Mock
Mock.Karen@dol.gov
Angela F. Donaldson
Donaldson.Angela@dol.gov
Office of the Solicitor
U.S. Department of Labor
61 Forsyth Street S.W.
Room 7T10
Atlanta, Georgia 30303

/s/ Charles H. Morgan
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*Secretary of Labor v. Imperial Sugar Company and
Imperial-Savannah, L.P.*

OSHRC Docket No. 08-1104

Respondents' Motion to Depose OSHA
Compliance Officers

The Hon. Covette Rooney

Exhibit C

February 9, 2009 Letter from Karen E. Mock to
Charles H. Morgan

Served via UPS Next Day Air on CD
on March 5, 2009

U.S. Department of Labor

Office of the Solicitor
61 Forsyth Street SW
Atlanta, Georgia 30303



Via Electronic Mail Only

February 9, 2009

Charles H. Morgan, Esq.
Alston & Bird, LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424

Re: Secretary of Labor v. Imperial Sugar Company; Imperial-Savannah, L.P.
OSHRC Docket No. 08-1104; Region IV
SOL Case No. 08-60093

Dear Mr. Morgan:

I am in receipt of your letters dated February 5, 6, and 9, 2009 and attached subpoenas and notices of deposition pursuant to Fed. R. Civ. P. 30(b)(6) indicating Respondent Imperial-Savannah, L.P.'s plans to conduct depositions of a Federal OSHA official in Buffalo, New York on February 18; Maryland OSHA officials on March 3; and Michigan OSHA officials on March 6, 2009. Complainant continues to object to these depositions on a number of grounds. First, in your February 5 letter you reference a "review of the files we have received from OSHA, . . ." If Respondents intend to use the contents of State and Federal OSHA inspection files to support their claims and/or defenses, such material is responsive to one or more of Complainant's discovery requests. Respondents have not produced any such files to Complainant in response to discovery requests. Further, since Complainant did not request such documents during the investigation, they were not, to my knowledge, provided previously. Please produce all documents received from Federal and State plan officials referenced in your letter as soon as possible, but not later than Wednesday, February 11.

Second, your February 6 and 9, 2009 letters indicate the depositions of Maryland and Michigan OSHA officials will be conducted pursuant to Rule 30(b)(6), yet the notices and subpoenas fail to identify the areas of inquiry and do not reference an inspection. Please provide deposition notices that comply to Rule 30(b)(6). Also, Rule 30(b)(6) provides that the organization must designate the person who consents to testify on its behalf. Please advise whether Respondents or Maryland and Michigan OSHA chose the individuals identified in the notices. If Respondents chose them, please identify them fully and provide complete contact information, including telephone numbers, as requested in the Complainant's Interrogatories. Please also state the basis for noticing such depositions pursuant to Rule 30(b)(6), if the persons to be deposed were chosen by Respondents.

Working for America's Workforce

Charles H. Morgan, Esq.
Page Two
February 9, 2009

Third, Complainant does not believe Respondents have shown the relevance of the information sought through depositions of Federal OSHA officials regarding other inspections to these proceedings. See Seibel Modern Mfg. & Welding Corp., 15 BNA OSHC 1218 (No. 88-821, 1991). Thus, Complainant cannot consent to these depositions and will formally oppose this discovery. Based on the very limited information Respondents have provided to date with respect to the State plan depositions, Complainant is without sufficient information to determine whether the depositions seek discovery of non-privileged matter that is relevant to the claims and defenses raised in this litigation.

Finally, I intend to attend any depositions of Federal and State OSHA officials if Judge Rooney authorizes such discovery. I will be out of the office February 18 through 20.

Thank you for your attention to this matter. If you have any questions, please contact me at 404/302-5459.

Sincerely,

Stanley E. Keen
Regional Solicitor

By: s/Karen E. Mock
Karen E. Mock
Senior Trial Attorney

cc: Patrick J. Veters, Esq.
Michael D. Schoen, Esq.

*Secretary of Labor v. Imperial Sugar Company and
Imperial-Savannah, L.P.*

OSHRC Docket No. 08-1104

Respondents' Motion to Depose OSHA
Compliance Officers

The Hon. Covette Rooney

Exhibit D

February 13, 2009 Letter from Charles H. Morgan to
Karen E. Mock

Served via UPS Next Day Air on CD
on March 5, 2009

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February 13, 2009

Karen E. Mock, Esq.
Office of the Solicitor
U.S. Department of Labor
61 Forsyth Street, SW
Room 7T10
Atlanta, Georgia 30303

Re: *Secretary of Labor v. Imperial-Savannah, L.P. et al.*
OSHRC Docket No. 08-1104

Dear Karen:

Pursuant to the Complainant's requests that Respondent provide copies of files that we have received from Complainant and state plan agencies which relate to the depositions we have noticed and proposed, enclosed is a CD containing those files, marked for identification purposes IMPERIAL-0000200 through IMPERIAL-0001965. Respondent is providing these documents to Complainant based on Complainant's indication in your February 9, 2009 letter that these documents are responsive to one or more of Complainant's discovery requests.

Pursuant to my email yesterday, we will not plan on going forward with the deposition noticed for February 18, 2009 in Buffalo, based on your conflict. As noted in my email, I would appreciate it if you would provide me alternative dates. I will be working with the Maryland and Michigan folks to firm up the dates planned for their depositions, March 3 and March 6. I am assuming that you have no conflict with these dates.

I have read the *Seibel* case. It is not relevant to these facts. Among the many reasons these depositions are relevant, Complainant has made industry recognition an issue in this case. Further, Complainant has already conceded the relevance of the subject matter of these depositions, through Complainant's indication that the very files which serve as the basis for these depositions are relevant subjects of Complainant's discovery requests.

We will have a great deal of discovery to get through in this case, and I intend to work with Complainant at every step to ensure that the discovery is reasonable, appropriate and, as much as possible, convenient. I strongly disagree, however, that the

Karen E. Mock, Esq.
February 13, 2009
Page 2

planned depositions are somehow outside the scope of discovery in this case. I am happy to discuss this at your convenience.

Sincerely,



Charles H. Morgan

CHM:chm
Enclosure

cc: Angela F. Donaldson, Esq.
Matthew J. Gilligan, Esq.
Ashley D. Brightwell, Esq.
Jeremy Tucker, Esq.

LEGAL02/31153451v2