IN RE H.E.L.P.E.R., INC.

EPCRA Appeal No. 98–3

FINAL DECISION

Decided June 21, 1999

Syllabus

H.E.L.P.E.R., Inc. ("Helper") operates an electrical equipment reclamation and recycling facility in Madison, South Dakota. The company recovers copper, steel, and brass from transformers that have reached the ends of their useful lives. Helper also processes mineral oils, such as transformer oil and mineral oil dielectric fluid, used in electrical equipment. These mineral oils contain varying concentrations of polychlorinated biphenyls ("PCBs"). In 1992, EPA Region VIII inspected Helper's facility and determined that on October 15, 1992, Helper had approximately 8,000 gallons, or roughly 57,000 pounds, of PCB-contaminated mineral oil on-site.

On May 25, 1995, Region VIII filed an administrative complaint charging Helper with two violations of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. §§ 11001–11050. In Count I, the Region alleged that Helper failed to submit, in timely fashion, a material safety data sheet ("MSDS") for PCBs handled at its facility, in violation of EPCRA § 311, 42 U.S.C. § 11021. In Count II, the Region alleged that Helper failed to submit, in timely fashion, a hazardous chemical inventory form for PCB-contaminated liquids stored on-site on October 15, 1992, in violation of EPCRA § 312, 42 U.S.C. § 11022.

After holding a hearing on this matter, Administrative Law Judge Andrew S. Pearlstein ("Presiding Officer") held that Helper was not required to submit an MSDS or an inventory form because the company did not have sufficient quantities of "hazardous chemicals" on-site to trigger the reporting requirements cited in the complaint (i.e., 10,000 pounds). Accordingly, the Presiding Officer dismissed the complaint. Region VIII appealed, arguing primarily that the Presiding Officer erred as a matter of law in finding that the quantities of hazardous chemicals at Helper did not meet the 10,000-pound EPCRA reporting threshold. The Region contends that Helper had nearly 57,000 pounds of mineral oil at its facility on October 15, 1992, and that Helper's mineral oil, separate and apart from its PCB content, qualifies as a reportable hazardous chemical on two separate grounds. First, the Region argues that mineral oil is a hazardous chemical because it is flammable. Second, the Region argues that mineral oil is a hazardous chemical because a "permissible exposure limit" and a "threshold limit value" (indicators of hazardousness in this context) have been assigned to mineral oil in its mist form, and because mineral oil mist may potentially be generated at Helper during normal working conditions or in foreseeable emergencies.

Held: The Presiding Officer's dismissal of this case is AFFIRMED. First, the Environmental Appeals Board finds that the Region's shift in focus from PCBs, as pled in its complaint, to mineral oil, as argued before the Presiding Officer and in this appeal, is procedurally permissible. Helper presented evidence and testimony regarding mineral oil

at the hearing and did not claim that it was surprised or prejudiced in any way by the litigation of the issue. Accordingly, the Board will treat the complaint as amended to conform to the evidence presented at the hearing.

Second, the Board finds that Region VIII failed to establish the requisite elements of the alleged EPCRA violations and that its case must therefore fail. In particular, the Region did not present any credible evidence that mineral oil mist exists or even may exist at Helper's facility. Moreover, the Region did not present any credible evidence that Helper's employees could potentially be exposed to such mist. These elements of proof are necessary threshold components of the evidence required to establish the violations alleged in this case, and their absence is fatal. Furthermore, the Region's flammability argument was not raised below and thus will not be considered on appeal. The Presiding Officer's dismissal is therefore affirmed.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

This appeal began with an administrative complaint charging H.E.L.P.E.R., Inc.[1] ("Helper") with the following violations of the Emergency Planning and Community Right-to-Know Act ("EPCRA" or "Act"), 42 U.S.C. §§ 11001–11050: (1) failing to timely submit a material safety data sheet ("MSDS") for polychlorinated biphenyls ("PCBs") contained in transformer oil and mineral oil dielectric fluid ("MODEF") handled by Helper at its facility, in violation of EPCRA § 311, 42 U.S.C. § 11021; and (2) failing to timely submit a hazardous chemical inventory form for PCB-contaminated liquids, in violation of EPCRA § 312, 42 U.S.C. § 11022. While the complaint was never formally amended, U.S. EPA Region VIII's ("the Region" or "Region VIII") theory of the case subsequently shifted away from PCBs in the face of information provided by Helper demonstrating that PCBs were not present at its facility in sufficient quantities to give rise to EPCRA regulation. Instead, the Region argued that Helper's mineral oil (i.e., transformer oil or MODEF), separate and apart from its PCB content, is EPCRA-regulated and that Helper violated the MSDS and chemical inventory requirements with respect to mineral oil.

After a hearing on this matter, Administrative Law Judge Andrew S. Pearlstein ("Presiding Officer") held that Helper was not required to submit an MSDS or an inventory form because the company did not have sufficient quantities of hazardous chemicals on-site to trigger the reporting requirements cited in the complaint. Accordingly, the Presiding Officer dismissed the complaint. Region VIII appealed, arguing primarily

[1] "H.E.L.P.E.R." is an acronym for "Hazardous Electrical Line Power Equipment Removal." Helper's customers consist primarily of electrical cooperatives and utility companies. Hearing Exhibit 11 [hereinafter Ex.].

that the Presiding Officer erred as a matter of law in finding that the quantities of hazardous chemicals at Helper's facility did not meet the minimum threshold for EPCRA reporting. We conclude that the Region's arguments, none of which spring naturally from the Region's complaint and some of which are raised for the first time on appeal, are without force and therefore affirm the Presiding Officer's dismissal of the complaint.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

Under EPCRA sections 311 and 312, the owner or operator of any facility required, under the Occupational Safety and Health Act ("OSH Act")[2] and accompanying regulations, to "prepare or have available" an MSDS for a "hazardous chemical" must submit that MSDS, as well as prepare and submit a hazardous chemical inventory form ("inventory form"), to each of the following:

> (1) The appropriate local emergency planning committee ("LEPC");
>
> (2) The state emergency response commission ("SERC"); and
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> (3) The fire department with jurisdiction over the facility.[3]

EPCRA §§ 311(a)(1), 312(a)(1), 42 U.S.C. §§ 11021(a)(1), 11022(a)(1).

The OSH Act, upon which EPCRA draws heavily in delineating the scope of sections 311 and 312, speaks in terms of "employers," "employees," and "manufacturers" (unlike EPCRA, which imposes requirements on "owners" and "operators"). An "employer" is, among other things, any corporation—such as Helper—that is "engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5); *see* 29 C.F.R. § 1910.1200(c). The OSH Act mandates that each employer comply with

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[2] 29 U.S.C. §§ 651–671.

[3] In lieu of submitting the actual MSDS for each hazardous chemical on site, an owner or operator may submit a list of such chemicals. *See* EPCRA § 311(a)(1)–(2), 42 U.S.C. § 11021(a)(1)–(2). In terms of timing, initial MSDSs (or chemical lists) must be submitted no later than three months after an owner/operator becomes subject to the OSH Act requirement to "prepare or have available" the MSDSs. *Id.* § 311(d), 42 U.S.C. § 11021(d); 40 C.F.R. § 370.21(c)(2). Inventory forms for each calendar year must be submitted on or before March 1 of the following calendar year. EPCRA § 312(a), 42 U.S.C. § 11022(a); 40 C.F.R. § 370.25(a)–(b).

occupational safety and health standards promulgated by the Secretary of Labor. *See* 29 U.S.C. §§ 654(a)(2), 655(a). The standards relevant in this context, collectively called the "Hazard Communication Standard" ("HCS"), 29 C.F.R. § 1910.1200, require employers to provide their employees with information and training on the hazardous chemicals they may be exposed to in the workplace. *Id.* § 1910.1200(b)(1). Among other things, each employer must develop and make available to its employees a written "hazard communication program" that includes a list of all the hazardous chemicals known to be present on the site. *Id.* § 1910.1200(e). Employers must also have an MSDS in the workplace for every hazardous chemical known to be present on-site. *Id.* § 1910.1200(g).

The Occupational Safety and Health Administration ("OSHA"), which administers the HCS, recommends that employers first survey their workplaces before compiling their lists of hazardous chemicals. According to OSHA:

> The broadest possible perspective should be taken when doing the survey. * * * The HCS covers chemicals in all physical forms—liquids, solids, gases, vapors, fumes, and mists—whether they are "contained" or not. The hazardous nature of the chemical and the potential for exposure are the factors [that] determine whether a chemical is covered. If it's not hazardous, it's not covered. If there is no potential for exposure (e.g., the chemical is inextricably bound and cannot be released), the rule does not cover the chemical.

29 C.F.R. § 1910.1200 app. E.3.

As is made clear in this provision, the reach of the HCS is limited in two ways: (1) by degree of hazard, and (2) by potential for exposure. First, the HCS applies only to chemicals that are "hazardous," which means they constitute a "physical hazard" or a "health hazard."[4] 29 C.F.R.

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[4]Chemical manufacturers are responsible for making "hazard determinations," using detailed scientific definitions of the terms "physical hazard" and "health hazard," to evaluate whether chemicals pose such risks. *See* 29 C.F.R. § 1910.1200(d)(1). For example, a "physical hazard" is defined under the HCS as:

> [A] chemical for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water-reactive.

Continued

§ 1910.1200(a)–(b); *see id.* § 1910.1200(c) (defining "hazardous chemical"). Chemicals must be treated as hazardous if they are listed in either of two publications: (1) 29 C.F.R. part 1910, subpart Z, which designates "Permissible Exposure Limits" ("PELs") for various substances; and (2) *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment,* published by the American Conference of Governmental Industrial Hygienists ("ACGIH"), which designates safe levels for worker exposure to various chemicals, called "threshold limit values" ("TLVs"). *Id.* § 1910.1200(d)(3)(i)–(ii).

Second, the HCS applies only to chemicals that are "known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency." *Id.* § 1910.1200(b)(2). An employee is "exposed" if, in the course of employment, he or she is or potentially could be subjected[5] to a chemical that is a physical or health hazard. *Id.* § 1910.1200(c). A "foreseeable emergency" is "any potential occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment [that] could result in an uncontrolled release of a hazardous chemical into the workplace." *Id.* These provisions establish that if no potential exists for employees to be exposed to a particular chemical, then HCS obligations will not attach on the basis of that chemical—even if the chemical is HCS-hazardous. *See id.* § 1910.1200(b)(2).

Id. § 1910.1200(c). A "health hazard" is:

> [A] chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees. The term "health hazard" includes chemicals [that] are carcinogens, toxic or highly toxic agents, reproductive toxins, irritants, corrosives, sensitizers, hepatotoxins, nephrotoxins, neurotoxins, agents [that] act on the hematopoietic system, and agents [that] damage the lungs, skin, eyes, or mucous membranes.

Id. Employers may rely on these hazard determinations, which are presented along with other information in the MSDSs that manufacturers are obliged to send to purchasers of their products. *See id.* § 1910.1200(d)(1), (g)(6). However, if an employer chooses not to rely on a manufacturer's hazard determination, that employer must perform its own hazard determination. *Id.* § 1910.1200(d)(1). Fortunately for many employers and others, the HCS provides a shorthand method of hazard evaluation as an alternative to the technical definitions of hazardousness. See subsequent discussion above of two publications setting forth "PELs" and "TLVs" for various chemicals.

[5]"'Subjected' in terms of health hazards includes any route of entry (e.g., inhalation, ingestion, skin contact, or absorption)." 29 C.F.R. § 1910.1200(c).

Under EPCRA, if an owner or operator has less than 10,000 pounds of a hazardous chemical[6] at its facility, or less than 500 pounds of an "extremely hazardous substance,"[7] it need not comply with the section 311 and 312 reporting requirements for that chemical.[8] 40 C.F.R. § 370.20(b)(1)–(2). These exemptions are designed to balance the public's right to know about chemicals in the community with state and local governments' ability to process large quantities of reported data and organize it in accessible fashion.[9]

Finally, the reporting requirements for mixtures of chemicals are different under EPCRA (and the OSH Act) than those for "pure" chemicals.[10] Owners/operators have the option of submitting MSDSs and inventory forms for each hazardous chemical *component* of a mixture, or they may submit MSDSs and inventory forms for the mixture *as a whole.* EPCRA §§ 311(a)(3), 312(a)(3), 42 U.S.C. §§ 11021(a)(3), 11022(a)(3); 40 C.F.R. § 370.28(a). If the former method is chosen, only those chemicals that

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[6]EPCRA contains no separate definition of "hazardous chemical" but rather adopts the HCS definition (with certain exceptions, none of which are relevant here). *See* EPCRA §§ 311(e), 312(c), 329(5), 42 U.S.C. §§ 11021(e), 11022(c), 11049(5).

[7]Under the EPCRA regulations, an "extremely hazardous substance" is any substance "listed in the appendices to 40 CFR part 355, Emergency Planning and Notification." 40 C.F.R. § 370.2. None of the chemicals of concern in this case are "extremely hazardous substances" within the meaning of these rules. *See* 40 C.F.R. pt. 355 apps. A–B.

[8]By contrast, neither the OSH Act nor the HCS establish minimum quantities of chemicals that must be present in a workplace before HCS responsibilities are triggered.

[9]*See,* e.g., 55 Fed. Reg. 30,632, 30,635 (July 26, 1990) ("In establishing [the] final reporting threshold, EPA attempted to strike the best balance between the amount of information generated for the public and the value of that information, and the cost to SERCs, LEPCs, and facilities of managing and providing the information."); 52 Fed. Reg. 38,344, 38,351 (Oct. 15, 1987) ("EPA's primary concern in establishing thresholds under sections 311 and 312 is to prevent [s]tate and local governments from being so overwhelmed with submissions * * * that effective public access and government use of the information are not possible").

[10]Interestingly, neither EPCRA nor the EPCRA §§ 311/312 regulations define the term "mixture." *See* EPCRA §§ 301–330, 42 U.S.C. §§ 11001–11050; 40 C.F.R. pt. 370. The HCS, however, supplies a very precise definition, which is not surprising given OSHA's recognition of the fact that many of the chemicals in the workplace today are mixtures, not "pure" chemicals. *See,* e.g., 48 Fed. Reg. 53,280, 53,290 (Nov. 25, 1983) ("The determination of mixtures to be covered by the [HCS] is particularly critical since most chemicals produced and used in the manufacturing sector are mixtures, not 'pure' substances."). Under the HCS, a "mixture" is "any combination of two or more chemicals if the combination is not, in whole or in part, the result of a chemical reaction." 29 C.F.R. § 1910.1200(c); *accord* 40 C.F.R. § 372.3 (EPCRA § 313 rules governing toxic chemical reporting).

comprise more than 1.0 percent by weight of the mixture (or more than 0.1 percent by weight if carcinogenic) need be reported.[11] 40 C.F.R. § 370.28(b)(1).

B. *Factual Background*

1. *Helper's Operations*

Helper operates an electrical equipment reclamation and recycling facility in Madison, South Dakota. The company recovers copper, steel, and brass from transformers that have reached the ends of their useful lives. Helper also processes mineral oils used in electrical equipment, such as transformer oil and MODEF, which it receives either enclosed within the electronic equipment itself or separately in barrels. These oils contain varying concentrations of PCBs, which are highly toxic compounds whose fire resistance and chemical stability historically made them popular choices for use in electrical equipment.[12]

To handle PCB-laden mineral oils in lawful fashion, Helper received authorization from EPA to operate as a commercial PCB storage facility under the Toxic Substances Control Act ("TSCA"). *See* TSCA § 6(e), 15 U.S.C. § 2605(e); 40 C.F.R. § 761.65(d); Ex. 9. Helper prepared a Spill Prevention Control and Countermeasure Plan ("SPCC Plan") for its facility in 1989 or 1990 to fulfill one of the conditions of its PCB storage authorization. *See* Ex. 9 (SPCC Plan); 40 C.F.R. § 761.65(d)(2)(iv) (written closure plan is condition of PCB storage approval). Helper has EPA approval to store at its facility a maximum of 8,000 gallons of "PCB-contaminated liquids" that contain between 50 and 499 parts per million ("ppm") of PCBs. Hearing Transcript at 112 [hereinafter Tr.]; Exs. 6, 9.

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[11]This provision is designed to be consistent with the HCS hazard determination regulation pertaining to mixtures, which provides in relevant part:

> If a mixture has not been tested as a whole to determine whether the mixture is a health hazard, the mixture shall be assumed to present the same health hazards as do the components [that] comprise one percent (by weight or volume) or greater of the mixture, except that the mixture shall be assumed to present a carcinogenic hazard if it contains a component in concentrations of 0.1 percent or greater [that] is considered to be a carcinogen * * *.

29 C.F.R. § 1910.1200(d)(5)(ii).

[12]For example, PCBs have a high "flash point," or temperature at which they will ignite. According to an MSDS prepared by Genium Publishing Corporation, the flash point of PCBs ranges from 284°F to 392°F. *See* Ex. 9. The presence of such chemicals in transformer oil or MODEF "reduces the likelihood of fire in the event of transformer rupture." *Yaffe Iron & Metal Co. v. EPA,* 774 F.2d 1008, 1010 n.1 (10th Cir. 1985).

2. *EPA Inspection of Helper*

In 1992, Region VIII conducted a routine TSCA inspection of Helper. The Region determined from materials gathered during the inspection that on October 15, 1992, Helper had approximately 8,000 gallons, or roughly 57,000 pounds,[13] of PCB-contaminated liquids on-site.[14] Assuming the liquids contained 499 ppm PCBs (the highest concentration authorized under Helper's TSCA permit), Helper had, at most, approximately 30–31 pounds of actual PCBs on-site that day. *See* Ex. 15. The remainder of the PCB-contaminated liquids (approximately 56,970 pounds) consisted of mineral oil (i.e., transformer oil or MODEF).

3. *Helper's Reporting Efforts*

In February 1993, Helper revised its SPCC Plan and included an MSDS for PCBs as an attachment to the Plan. Helper sent a copy of the revised Plan and attachment to the Lake County Emergency Management Agency, which is the LEPC covering the Madison area. Tr. at 135–37. Helper also sent copies to the Madison Fire Department, which is the fire department with jurisdiction over Helper's facility, and to "the state" (which may have been someone in the South Dakota Department of Environment and Natural Resources rather than Lee Ann Smith, who is in charge of the South Dakota SERC—the record does not make this clear). *See* Tr. at 118, 121, 136–37, 180, 186–87, 194–95.

On July 8, 1993, Michael Yocum, Helper's environmental compliance manager, telephoned Ralph Houck of Region VIII. He apparently made the call because he had been informed by Ronald Hughes of the LEPC that EPA "wanted some records," and Helper wanted to cooperate with EPA. Ex. 7. Mr. Houck asked Mr. Yocum whether he had ever submitted MSDSs to the SERC, LEPC, or fire department on Helper's behalf. Mr. Yocum informed Mr. Houck that he had not, but that he had sent in Helper's SPCC Plan. Mr. Yocum also apparently indicated that Helper had only 500 or so gallons of solvent on hand, and thus he did not think the company needed to file an MSDS. *Id.* After Mr. Yocum admitted that he

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[13]The weight of the PCB-contaminated liquids (MODEF and transformer oil, both of which are types of mineral oil, Tr. at 222) is calculated by factoring in the specific gravity of mineral oil (which is 0.85). Tr. at 89. One gallon of mineral oil weighs 7.1 pounds, so 8,000 gallons of mineral oil weigh nearly 57,000 pounds. *Id.*

[14]"PCB-contaminated liquid" is not itself a listed hazardous chemical for EPCRA reporting purposes. As discussed in Part I.A above, it may nonetheless be EPCRA-regulated if its constituents are themselves listed chemicals that are present in the requisite concentrations. *See* 40 C.F.R. § 370.28(b)(1).

did not know what "Tier I" forms—a type of EPCRA inventory form—were, Mr. Houck explained the reporting requirements of sections 311 and 312. Mr. Houck then agreed, at Mr. Yocum's request, to send Helper samples of the inventory reporting forms. *Id.*

Helper subsequently filed two hazardous chemical inventory forms with the South Dakota SERC on October 20, 1994. Tr. at 60; *see* Ex. 6. The forms, which covered calendar years 1992 and 1993, identified three hazardous chemicals—PCBs, copper, and "1–1–1 tri"—that Helper handled at its facility during those years. Ex. 6. Helper specified that "PCBs" were present at its facility in pure form, solid form, and liquid form. Helper did not check boxes that would have identified PCBs as being present in a mixture or in gaseous form or as being an "extremely hazardous substance." Helper reported that during both 1992 and 1993, it had 100,000 pounds maximum of "PCBs" on-site per day and 60,000 pounds per day on average. *See id.* In fact, the quantities of "PCBs" Helper reported actually referred to PCB-contaminated liquids it had at its facility in those time frames—an approach Helper later determined to have been mistaken. At a maximum permitted concentration of 499 ppm PCBs, these liquids were comprised of at least 99.95 percent mineral oil and at most 0.05 percent PCBs. *See* Tr. at 245 (Presiding Officer's judicial notice of fact that 500 ppm equals 0.05 percent).

C. *Procedural Background*

On May 25, 1995, Region VIII filed an administrative complaint charging Helper with two violations of EPCRA. In the introductory portion of the complaint, Region VIII alleged that PCBs are "hazardous chemicals" under EPCRA. Administrative Complaint ¶ 4 [hereinafter Complaint]. The Region then alleged in Count I that during calendar year 1992, Helper had "PCB-contaminated liquids" at its facility in an amount greater than the EPCRA reporting threshold of 10,000 pounds. *Id.* ¶ 6. The Region contended that Helper had failed to submit an MSDS for "PCBs" (not "PCB-contaminated liquids") on or before October 17, 1987 (or three months after Helper first became subject to the OSH Act, whichever was later), in violation of EPCRA § 311, 42 U.S.C. § 11021. *Id.* ¶¶ 8–9. In Count II, the Region alleged that Helper had failed to submit, by March 1, 1993, a hazardous chemical inventory form for "PCB-contaminated liquids" it had stored on-site in 1992, in violation of EPCRA § 312(a), 42 U.S.C. § 11022(a). *Id.* ¶¶ 11–12.

Helper originally admitted that it had more than 10,000 pounds of "PCB-contaminated liquids" on-site in 1992, as alleged in Count I. Answer and Request for Hearing ¶ 6 (filed June 19, 1995). A year after filing its

answer (and five months before the scheduled hearing), however, Helper filed an amended answer, denying that it had more than 10,000 pounds of "PCB-contaminated liquids" on-site in 1992. Helper claimed that the original admission of this fact had been a typographical error that misstated its position.[15] Respondent's Motion to Amend Answer (filed Sept. 4, 1996); *see* Amended Answer and Request for Hearing ¶ 6 (filed Sept. 4, 1996) [hereinafter Amended Answer].

In response to Helper's changed position, Region VIII revised its own theory of the case. A week before the hearing, the Region obtained from OSHA an opinion letter that, according to EPA, established that mineral oil and mixtures of mineral oil and PCBs were hazardous chemicals under the OSH Act. *See* Tr. at 24–25; Ex. 2. The Region proceeded to try the case before the Presiding Officer on the theory that (1) Helper's PCB-contaminated liquids were comprised of mineral oil and PCBs, and (2) mineral oil itself is a hazardous chemical under the OSH Act and EPCRA because it carries the PEL and TLV for "mineral oil mist."[16] *See,* e.g., Complainant's Brief in Support of Proposed Findings of Fact and Conclusions of Law (Apr. 15, 1997) [hereinafter Complainant's Brief].

Helper objected to any evidence or argument concerning mineral oil or mist, claiming that such evidence or argument exceeded the scope of the allegations in the complaint. *See,* e.g., Tr. at 24, 33–34, 49–50. Helper nonetheless introduced its own evidence pertaining to this issue and called an expert witness who testified that mineral oil is not a hazardous chemical under the OSH Act. *See* Tr. at 139–42, 223–26, 232; Ex. 6.

In dismissing the Region's case on the ground that Helper did not have 10,000 pounds of a hazardous chemical on-site, the Presiding Officer noted that the complaint did not "mention mineral oil, transformer oil, or any other chemical besides PCBs. Under a narrow reading of the

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[15]As stated in Parts I.A and I.B.3 above, because Helper's mineral oil was at most 0.05 percent PCBs, Helper was entitled to look to the actual amount of PCBs in its mineral oil—30–31 pounds—rather than to the entire quantity of its mineral oil for purposes of determining its EPCRA reporting obligations relative to PCB-contaminated liquids. *See,* e.g., 40 C.F.R. § 370.28(a)(1), (b)(1).

[16]"Mineral oil mist," but not mineral oil per se, is identified in ACGIH's publication as having a TLV of 5 milligrams per gram cubed ("mg/g^3") and thus is treated as a hazardous chemical. *See* Ex. 3. The TLV is expressed as a time-weighted average concentration for a normal eight-hour work day in a forty-hour work week of the type "to which nearly all workers may be repeatedly exposed, day after day, without adverse effect." Ex. 16. Mineral oil mist—but again not mineral oil *per se*—is also listed in OSHA's toxic and hazardous air contaminant tables as having a PEL of 5 mg/g^3 averaged over an eight-hour work shift and a forty-hour work week. *See* 29 C.F.R. § 1910.1000(a)(2) & tbl. Z–1.

charges, the inquiry could end here." Initial Decision at 6 [hereinafter Init. Dec.]. The Presiding Officer did not adopt the narrow reading he identified, however. Instead, he reached the merits of the case, holding that mineral oil is not a hazardous chemical. The Presiding Officer stated:

> [The ACGIH TLV] standard [of 5 mg/g^3 for mineral oil mist] has no relation to the conditions of mineral oil storage at the HELPER facility, where no mist is generated. * * * At HELPER, the mineral oil or transformer oil remains in liquid form in enclosed tanks or containers at all times. Even in the unlikely event of an accidental rupture, there would not be the type of continued exposure contemplated by the ACGIH list of TLVs. The ACGIH's listing thus indicates that mineral oil can be considered hazardous only as a mist, not as an enclosed liquid.

Id. at 8. The Presiding Officer therefore concluded that Helper did not have at its facility sufficient quantities of any hazardous chemical or mixture of chemicals to trigger EPCRA reporting. *Id.*

On appeal, Region VIII has again shifted its theory of the case, at least in part. The Region continues to argue that the mineral oil at Helper's facility is a hazardous chemical because it carries a PEL and TLV in its mist form. The Region also, however, raises the wholly new and, in our view, ill-considered argument that mineral oil presents a physical hazard—and is thus a hazardous chemical—because it purportedly is a flammable liquid. Each of these contentions is addressed below.

II. *DISCUSSION*

The Board reviews the Presiding Officer's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.31(a) (the Board shall "adopt, modify, or set aside" the Presiding Officer's findings and conclusions). Matters in controversy must be established by a preponderance of the evidence. *Id.* § 22.24; *see In re B.J. Carney Indus., Inc.,* 7 E.A.D. 171, 217 (EAB 1997).

We are presented at the outset with a procedural question: Should the Region be permitted to go forward with its mineral oil theory in view of the complaint's sole focus on PCBs? In Part II.A below, we answer this question in the affirmative. In Part II.B, we turn to the merits and consider whether the Presiding Officer erred in finding that mineral oil is not a hazardous chemical under EPCRA.

A. *Amending the Complaint to Conform to the Evidence*

At the hearing on January 28, 1998, Helper repeatedly objected to Region VIII's introduction of evidence regarding mineral oil and mineral oil mist, claiming that the complaint charged the company with violations involving PCBs and PCB-contaminated liquids only, not mineral oil or mist. *See,* e.g., Tr. at 24, 33–34, 49–50. The Region concedes in its appellate brief that it did not specifically plead mineral oil as a hazardous chemical. Appellant's Brief in Support of Appellant's Proposed Alternative Findings of Fact and Conclusions of Law or Discretion at 17 [hereinafter Appellant's Brief].[17] The Region also contends that its drafting of the complaint—in which it alleged only that PCBs are hazardous chemicals and that Helper failed to file an MSDS for PCBs (not PCB-contaminated liquids)—constituted harmless error. *Id.* at 16 n.18. According to the Region, Helper "knew exactly what the Region was referring to" when the Region alleged in the complaint that Helper had failed to file an MSDS for "PCBs." As evidence of this, the Region points to Exhibit 6, the hazardous chemical inventory forms from 1992 and 1993, in which Helper used the term "PCBs" to refer to its PCB-contaminated liquids stored on-site. *See id.;* Ex. 6. We fail to understand, however, how the reference to PCB-contaminated liquids is materially more informative in this respect than the term "PCBs."[18]

At bottom, we do not believe that the Region's mineral oil theories, which it propounded only when faced with Helper's denial of the EPCRA reporting threshold, can reasonably be found within the four corners of the complaint. Furthermore, this case carries the appearance of theories constructed late in the proceedings as a means of salvaging an enforcement case that, while perhaps originally justified, had been predicated on

[17]Region VIII goes on to state that "in each of the counts, the Region specified that it was looking at each hazardous chemical at the facility that was a component of PCB-contaminated liquids, which includes MODEF." Appellant's Brief at 17. If this statement were true, then we would think it likely that the Region would have alleged that Helper failed to submit an MSDS for mineral oil in addition to alleging that it had failed to submit one for PCBs.

[18]The Region's decision to focus its harmless error argument on PCB-contaminated liquids, rather than on mineral oil, strikes an odd note. Mineral oil, after all, has been at the center of the Region's case ever since Helper amended its answer. The Region, however, may have felt constrained to limit its harmless error argument to PCBs and PCB-contaminated liquids because those were the only substances mentioned in the complaint: mineral oil, transformer oil, MODEF, and mineral oil mist garnered no mention there. *See* Complaint. The Region apparently did not feel similarly constrained in drafting the remainder of its appellate brief, which focuses for the most part on mineral oil and not PCB-contaminated liquids.

the mistaken factual assumption that Helper handled large, reportable quantities of PCBs.

Despite our concerns, we will not dismiss this case on the ground that none of the arguments raised before us were pled in the complaint. Our point of departure on this issue is the Consolidated Rules of Practice, 40 C.F.R. pt. 22. While the Consolidated Rules do not contain a provision explicitly authorizing amendment of pleadings to conform to the evidence, *see* 22 C.F.R. § 22.14(d),[19] the rules have been interpreted as allowing such amendments. *See,* e.g., *In re Wego Chem. & Mineral Corp.,* 4 E.A.D. 513, 523–25 (EAB 1993) ("party objecting to evidence on the ground that the material offered is not within the issues framed by the pleadings must meet a heavy burden"; showing of "serious disadvantage" or "surprise" necessary to sustain objection); *In re Port of Oakland,* 4 E.A.D. 170, 204–06 (EAB 1992) (accord); *In re Yaffe Iron & Metal Co.,* 1 E.A.D. 719, 722 (JO 1982) ("when pleadings vary from the issues actually litigated, the pleadings may be amended to conform to the proof so long as there is no undue surprise"), *aff'd & remanded on other grounds,* 774 F.2d 1008 (10th Cir. 1985). Moreover, administrative law judges have considerable discretion on matters such as these. *See,* e.g., *In re Lazarus, Inc.,* 7 E.A.D. 318, 334 (EAB 1997) (part 22 rules "depend on the presiding officer to exercise discretion throughout an administrative penalty proceeding").

Our view is further informed by the case law that has developed under Rule 15(b) of the Federal Rules of Civil Procedure, recognizing that district courts have discretion to treat pleadings as conforming to the evidence presented at trial.[20] *See,* e.g., *Davis & Cox v. Summa Corp.,* 751 F.2d 1507, 1522 (9th Cir. 1985); *Karlen v. Ray E. Friedman & Co. Commodities,* 688 F.2d 1193, 1197 n.3 (8th Cir. 1982); *Wasik v. Borg,* 423 F.2d 44, 46 & n.1 (2d Cir. 1970). District courts may find pleadings to be implicitly

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[19]This provision, entitled "Amendment of the complaint," states:

> The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer or Regional Administrator, as appropriate. Respondent shall have twenty (20) additional days from the date of service of the amended complaint to file his answer.

40 C.F.R. § 22.14(d).

[20]While we are not bound by the Federal Rules of Civil Procedure, they are nonetheless instructive in some circumstances. Rule 15(b) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in

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amended even if a party objects to certain evidence as being outside the issues raised in those pleadings, provided the party fails to convince the court that admission of the evidence would prejudice its case. *See,* e.g., *In re Beaubouef,* 966 F.2d 174, 176–77 (5th Cir. 1992) (after objection, party may not "simply remain silent and wait for reversal on appeal"; rather, party must demonstrate prejudice or request a continuance); *Walton v. Jennings Community Hosp., Inc.,* 875 F.2d 1317, 1320 n.3 (7th Cir. 1989) ("pleadings may be amended over the objection of another party, unless the objecting party can show that the introduction of evidence pertinent to issues not introduced in the pleadings would in some way prejudice his or her case"); *see also Lefever v. Commissioner,* 100 F.3d 778, 785–86 (10th Cir. 1996) (under Tax Court Rule 41(b), which "closely parallels" Rule 15(b), when a party "objects at trial that evidence is outside the scope of the pleadings, amendment may still be allowed unless the objecting party satisfies the court that he or she will be prejudiced by the amendment. * * * The party opposing amendment will be found to have consented to the trial of an issue when that party presents evidence on the issue at trial."). *But see In re Santa Fe Downs, Inc.,* 611 F.2d 815, 817 (10th Cir. 1980) ("'Where evidence has been admitted over objection and the pleadings have not been amended, no amendment can be implied[,]'" even where no prejudice to objecting party has been shown) (quoting 3 Moore's Federal Practice ¶ 15.13[2], at 15–177 (2d ed. 1979)).

Here, the issue of whether mineral oil is a hazardous chemical was fairly litigated below (notwithstanding its late arrival in the case). The Region introduced its case by claiming the evidence would show that both PCBs *and* mineral oil, and any mixture of these substances, are hazardous chemicals under the HCS. Tr. at 7. The Region then offered

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> the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Fed. R. Civ. P. 15(b). While this is a rule to guide district courts, appellate courts have relied upon it in appropriate cases as well. *See,* e.g., *Dunn v. Trans World Airlines, Inc.,* 589 F.2d 408, 412–13 (9th Cir. 1979) (pleadings may be amended to conform even at the appellate level); 6A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1494, at 57 (2d ed. 1990) ("There is no inherent harm in using Rule 15(b) on appeal by way of analogy as long as the trial court's record clearly indicates that the issue on which the case is to be affirmed actually was tried with the knowing consent of the parties.").

Exhibit 2, a letter from OSHA that it claimed showed OSHA considered mineral oil and mineral oil/PCB mixtures to be hazardous chemicals under the HCS. Tr. at 21–23; Ex. 2. Helper responded by introducing Exhibit 12, an MSDS for transformer oil prepared by Texaco, Inc.,[21] and by calling an expert witness, Stephen P. Busch, to testify that mineral oil is not a hazardous chemical under the OSH Act. Tr. at 139–42, 223–26, 232; Ex. 12. Helper did not claim that it was surprised by the Region's decision to litigate the issue of whether mineral oil is a hazardous chemical, nor did it establish that it was prejudiced or disadvantaged in any way sufficient to cause the Presiding Officer to sustain its objection to the litigation of the issue. Instead, Helper prepared and presented a reasonable defense relative to mineral oil and mineral oil mist. Helper did not claim that, had it had proper notice that this issue would be litigated, it would have presented other evidence or made other arguments to buttress its position that mineral oil is not a hazardous chemical. *See,* e.g., Appellee's Reply Brief. Accordingly, we will treat the complaint as implicitly amended to conform to the evidence presented at the hearing. In other words, the allegations in the complaint pertaining to PCBs and PCB-contaminated liquids will be deemed to refer to mineral oil as well. We therefore proceed to a review of the merits of the Region's mineral oil theories.[22]

B. *Mineral Oil's Status Under the OSH Act and EPCRA*

Region VIII argues that the Presiding Officer erred as a matter of law in finding that the quantity of hazardous chemicals at Helper's facility did not exceed the 10,000-pound EPCRA reporting threshold and thus did not

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[21]Unfortunately, Texaco's MSDS is not a model of clarity in this regard. It states, in rather confusing fashion, the following regarding transformer oil:

> Product [i.e., transformer oil] is non-hazardous according to OSHA (1910.1200), but is considered hazardous according to Texaco's internal criteria.
> # component [i.e., hydrotreated light naphthenic petroleum distillates, which comprise 95.00 to 99.99 percent of the product], by definition, is considered hazardous according to OSHA because it carries the permissible exposure limit (PEL) for mineral oil mist.

Ex. 12. The MSDS then lists the PEL (5 mg/g^3), TLV (5 mg/g^3), and short-term exposure limit ("STEL") (10 mg/g^3) for mineral oil mist. *Id.*

[22]We would encourage Region VIII, and other parties similarly situated, to resolve procedural issues of this sort in the future by filing with the Presiding Officer a motion pursuant to 40 C.F.R. § 22.14(d) to conform the complaint to the evidence presented at the hearing.

warrant the filing of an MSDS and an inventory form pursuant to sections 311 and 312. Appellant's Brief at 14. The Region contends that Helper had nearly 57,000 pounds of mineral oil at its facility on October 15, 1992, and that Helper's mineral oil, which is not itself a listed hazardous chemical, qualifies as a hazardous chemical on two separate grounds. First, the Region argues that mineral oil must be considered a physical hazard because it is flammable and consequently qualifies as a hazardous chemical. Second, the Region argues that Helper's mineral oil is a hazardous chemical because a PEL and a TLV have been assigned to mineral oil in its mist form, and because mineral oil mist may potentially be generated at Helper during normal working conditions or in foreseeable emergencies. These arguments are addressed in turn below.

1. *Flammability*

According to the Region, the Presiding Officer erroneously found that mineral oil in its liquid state is not a hazardous chemical. Appellant's Brief at 27. Under the HCS, any chemical that constitutes a "physical hazard" is deemed a hazardous chemical. 29 C.F.R. § 1910.1200(c). A "physical hazard" is, among other things, any chemical "for which there is scientifically valid evidence that it is * * * flammable." *Id.* The term "flammable," in turn, is defined as any chemical that falls into one of several categories, including the following:

> Liquid, flammable means any liquid having a flashpoint below 100°F (37.8°C), except any mixture having components with flashpoints of 100°F (37.8°C) or higher, the total of which make up 99 percent or more of the total volume of the mixture.

Id. As mentioned above, Helper's PCB-contaminated liquids are a mixture of at least 99.95 percent mineral oil and at most 0.05 percent PCBs. *See supra* Part I.B.3. The Region uses this fact to contend that under the definition quoted above, mineral oil's flash point of 295°F (as specified in the Texaco MSDS for mineral oil, *see* Ex. 12) qualifies Helper's PCB-contaminated liquid mixture as flammable. Appellant's Brief at 27–28. The Region concludes from this that Helper "was required to submit an MSDS and an inventory form for the PCB-contaminated liquids or MODEF." *Id.* at 28.

Importantly, Region VIII did not raise this "flammable liquid" argument below. *See* Complainant's Brief; Complainant's Reply Brief. Under the Consolidated Rules of Practice, 40 C.F.R. § 22.30(a), parties may only appeal adverse rulings or orders; they may not appeal issues that were

not raised before the presiding officer. *See,* e.g., *In re Lin,* 5 E.A.D. 595, 598 (EAB 1994); *In re Genicom Corp.,* 4 E.A.D. 426, 439–40 (EAB 1992). As a result, arguments raised for the first time on appeal—such as this one—are deemed waived. *See In re Woodcrest Mfg., Inc.,* 7 E.A.D. 757, 764 (EAB 1998). The Presiding Officer cannot be faulted for failing to decide an issue that neither side had briefed.[23]

2. *Mist*

As explained in Part I.A above, the reach of the HCS, and thus the reach of EPCRA in this context, is limited by two separate factors: (1) degree of hazard, and (2) potential for exposure. To succeed on an EPCRA section 311 or 312 cause of action, a complainant would have to establish, among other things, *both* that a particular chemical is HCS-hazardous *and* that workers at the targeted facility could potentially be exposed to the chemical during the course of their work or in a foreseeable emergency. *See* 29 C.F.R. § 1910.1200(b)(1)–(2), (c), app. E.3.

In this case, the Region argues that the Presiding Officer erred in finding that mineral oil does not occur in mist form at Helper but rather "'remains in liquid form in enclosed tanks or containers at all times.'" Appellant's Brief at 15 (quoting Init. Dec. at 8). According to the Region:

[23]We note that, in any event, the Region's flammability argument appears to be based on a serious misreading of the HCS. The Region asserts that "[t]o be considered a 'liquid flammable,' the MODEF must constitute 99 percent of the mixture and have a flashpoint greater than 100 degrees Fahrenheit." Appellant's Brief at 27. Yet, the HCS defines "liquid, flammable" as any liquid with a flash point below 100°F, except (i.e., with the exclusion of) any liquid mixture made up of 99 percent or more of components that have flash points of 100°F or higher. 29 C.F.R. § 1910.1200(c). Inexplicably, the Region omitted the word "except" in quoting the liquid flammable definition to the Board. *See* Appellant's Proposed Alternative Findings of Fact and Conclusions of Law or Discretion at 7 n.10, 11. The HCS definition, while perhaps not a model of clarity, appears to be intended generally to treat as "flammable" liquids with a low flashpoint and to exclude from coverage those liquid mixtures containing only small percentages of highly flammable components. *See,* e.g., 48 Fed. Reg. 53,280, 53,290 (Nov. 25, 1983) (mixture containing small concentration of acetone, a highly flammable liquid under most circumstances, may be tested and found not flammable, in which case manufacturer need not designate mixture as flammable on MSDS); 46 Fed. Reg. 4412, 4446 (Jan. 16, 1981) (Department of Labor's original HCS proposal, which defined "flammable liquid" as any liquid with a flash point above 20°F and below 100°F, "except that this term does not include any liquid mixture having one or more components with a flash point at or above 100°F * * * [that] together make up 99 percent or more of its total volume"). The Region's interpretation, which would treat as "flammable" liquid mixtures whose components have *high* flashpoints, would thus appear to turn the HCS on its head.

> [M]ineral oil, in at least the mist form, is a hazardous chemical. The logical extension of the worker protection focus of the [OSH Act] leads to the conclusion that workers who handle mineral oil in any form must be provided information regarding mineral oil if it is reasonably foreseeable that a spill could occur that would change the liquid mineral oil to mist, thereby exposing workers to the hazardous chemical, mineral oil mist.

Appellant's Brief at 21 (footnote omitted). The Region does not provide a citation to support this statement, but it appears to be a reference to the potential-for-exposure factor that is a condition of HCS coverage. *See* 29 C.F.R. § 1910.1200(b)(2). The Region subsequently concludes that Helper's employees could potentially be exposed to mist under normal conditions and in foreseeable emergencies, and that the Presiding Officer erred in finding otherwise. Appellant's Brief at 20–26.

Notably, the Region's approach to this issue on appeal differs from the case it presented below to the Presiding Officer, in which it treated mineral oil and mist interchangeably, contending (at least implicitly) that both were hazardous chemicals because a TLV and PEL for mineral oil mist existed. *See,* e.g., Complainant's Brief at 1–6; Complainant's Reply Brief at 5, 10. On appeal, the Region carefully restricts its claim, arguing that Helper's mineral oil is HCS-regulated solely by virtue of the potential generation of mineral oil mist, and forgoing the argument that mineral oil is itself hazardous *per se*.[24] *See* Appellant's Brief at 20–26.

The Region's problem, however, is its utter failure to construct a factual predicate for either of two closely related propositions: (1) that mineral oil mist, within the meaning of the applicable regulations,[25] is in fact likely to be present at Helper's facility; and (2) that Helper's employees could potentially be exposed to such mist. These failures of proof are glaringly apparent when one examines the administrative record. There is virtually no evidence in the record on these issues, and the small

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[24]Because, as explained below, we find a complete failure of proof on this issue, we are not deciding whether the Region's "potential generation" theory is necessarily the correct articulation of the standard for regulatory coverage in cases like this one involving derivative hazardous chemicals.

[25]The Region appears to believe that mineral oil "mist" can be formed merely through volatilization of mineral oil under ambient conditions. *See,* e.g., Appellant's Brief at 21. Such is not the case, however. The ACGIH makes clear in its document explaining TLVs that mineral oil "vapors" are not to be considered forms of mineral oil "mist." *See Ex.* 16 (mineral oil mist at any particular facility must be "sampled by a method that does not collect vapor" to determine whether it falls within the TLV).

amount that is present was not adduced by the Region but rather appeared there almost serendipitously.

The evidence relative to these questions can be summarized as follows. First, Stephen Busch, a witness called by Helper's counsel, testified on cross-examination that mineral oil mist consists of droplets of oil suspended in air. Tr. at 251–52. Mr. Busch also testified that, as a general proposition, mineral oil mist could be created if mineral oil being pumped under pressure through a hose or similar device were to escape through a small leak, or if a mechanical means of some type otherwise dispersed mineral oil into the air. Tr. at 252–53. However, according to Mr. Busch, Helper's operations are not of the kind that would generate mineral oil mist. Tr. at 253. Second, the Presiding Officer took judicial notice of Exhibit 16, an excerpt from an ACGIH publication on TLVs that neither party offered at the hearing as evidence pertaining to these issues.[26] That publication states:

> Oil mist can arise in a variety of mineral oil applications. Important applications associated with potential generation of oil mists are metal working, textile machinery, rock drills, mist lubrication, agriculture sprays, concrete molds, corrosion preventives, printing inks, rubber extenders, and food and pharmaceutical preparations.
>
> * * * * * * *
>
> In practice, oil mists may be generated by several routes, e.g., aeration, contact with a fast-moving surface, or heating.

Ex. 16.

Notwithstanding the conclusory statements in its briefs, *see,* e.g., Appellant's Brief at 21–22, 25–26; Complainant's Brief at 4; Complainant's Reply Brief at 8, the Region did not offer below any evidence that any potential circumstance associated with Helper's operations—including possible spill scenarios—might have been reasonably likely to generate mineral oil mist within the meaning of the OSH Act standard. The Region merely states:

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[26]The Region did in fact introduce Exhibit 8, a portion of the document the Presiding Officer noticed as Exhibit 16, during its redirect examination of Cheryl Turcotte, the EPCRA enforcement coordinator for Region VIII. Tr. at 98. That exhibit, however, was never received into evidence because the Region introduced it solely to establish that Ms. Turcotte had reviewed it and thus had some knowledge of mineral oil and mist. *See* Tr. at 98–100.

> The trial record established that it is a routine practice at HELPER to pump and drain mineral oil from transformer cores onto metal rollers, all in direct proximity to HELPER's workers. [Tr. at 254–55.] The [Presiding Officer] also found that HELPER opened the transformers and tested the PCB content and pumped the MODEF into tanks and trucks. [Init. Dec. at 3.]

Appellant's Brief at 21. Even if we were to accept that Helper pumped and drained mineral oil onto rollers and pumped MODEF into tanks and trucks, these "facts," by themselves, do not establish the possibility that mineral oil mist could result from these operations. Indeed, there is no evidence in the record that pumping and draining might tend to aerate or heat mineral oil in such a way that mist might be formed. There is likewise no evidence that pumping and draining might occur under sufficient pressure to suspend a liquid if a leak were to occur. There is not even any evidence regarding the susceptibility of Helper's hoses or other mineral oil transfer devices to leaks, or regarding any other mechanical means at the facility that could under certain conditions suspend mineral oil in the air.

Based on the sparse record before him, the Presiding Officer found, in essence, that the Region had failed to show that Helper's operations had the potential to generate mineral oil mist. In view of the Region's failure to adduce at least some evidence on this point and the related point of potential exposure of employees to mineral oil mist, we do not disagree. Accordingly, we conclude that the Region has failed to establish the requisite elements of the alleged EPCRA violations.

III. *CONCLUSION*

For the foregoing reasons, we affirm the Presiding Officer's dismissal of the Region's complaint against Helper.[27]

So ordered.

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[27]In its reply brief, Helper requests reimbursement of the attorneys' fees, expenses, and costs it incurred in the course of defending this action. Appellee's Reply Brief at 15. As authority for its request, Helper cites the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504. *See id.* That statute allows "prevailing parties" in certain administrative proceedings to recover attorneys' fees and costs from the government. To obtain reimbursement, a party:

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> shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application [that] shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified.

5 U.S.C. § 504(a)(2). The EPA regulations implementing this statute can be found at 40 C.F.R. pt. 17. *See* 40 C.F.R. pt. 17; *see also In re Hoosier Spline Broach Corp.,* 7 E.A.D. 665, 679–682 (EAB 1998) (discussing EAJA and part 17 rules).

At the time Helper filed its reply brief containing the request, final judgment had not yet been entered in this case. Thus, the request was premature. *See,* e.g.*, J.M.T. Mach. Co. v. United States,* 826 F.2d 1042, 1047 (Fed. Cir. 1987) (request in trial brief for attorneys' fees is defective because party did not and indeed could not at that point allege that final judgment had been entered or that it was a prevailing party). Moreover, the form of the request did not satisfy explicit EAJA requirements. *See* 5 U.S.C. § 504(a)(2); 40 C.F.R. pt. 17; *see also J.M.T. Mach.,* 826 F.2d at 1046–48. For these reasons, we dismiss Helper's request for fees and costs without prejudice to its timely filing of a claim under the EAJA. *See In re Woodcrest Mfg., Inc.,* 7 E.A.D. 757, 783 n.19 (EAB 1998).