

Count I of the Complaint alleges that Respondent failed to timely submit a material safety data sheet for the hazardous chemical polychlorinated biphenyls ("PCBs") to the South Dakota State Emergency Response Commission ("SERC"), the Local Emergency Planning Commission ("LEPC"), and the local fire department, constituting a violation of EPCRA §311, 42 U.S.C. §11021. Count II of the Complaint alleges that Respondent failed to timely submit a hazardous chemical inventory form for PCB-contaminated liquids to the SERC, LEPC, and fire department, constituting a violation of EPCRA §312, 42 U.S.C. §11022. The Complaint seeks assessment of a total civil penalty of \$20,790 against Respondent for these two violations. In its Amended Answer, Respondent denied the material allegations of the Complaint and requested a hearing.

The hearing in this matter convened before Administrative Law Judge Andrew S. Pearlstein on January 28, 1997, in Sioux Falls, South Dakota. The Region presented two witnesses, and HELPER presented five witnesses. The record of the hearing consists of a stenographic transcript of 262 pages, and 16 numbered exhibits received into evidence. The parties each submitted post-hearing briefs and reply briefs. The record of the hearing closed on May 13, 1997, upon the ALJ's receipt of the reply briefs.

Findings of Fact

1. The Respondent, H.E.L.P.E.R., Inc. ("HELPER"), is the owner and operator of an industrial facility located at Airport Industrial Park, Old Highway 34, Madison, Lake County, South Dakota. HELPER is in the business of processing, reconditioning, and recycling the components of used electrical equipment. HELPER receives, stores, and manages electrical transformers and capacitors that contain liquids contaminated with polychlorinated biphenyls ("PCBs"). (Ex. 9; Tr. 115).

2. HELPER has received EPA approval to operate as a commercial PCB storage facility, pursuant to Section 7 of the Toxic Substances Control Act, 15 U.S.C. §2605, and 40 CFR §761.65(d). The approval authorized HELPER to store a maximum of 8000 gallons of mineral oil dielectric fluid ("MODEF") containing from 50 to 499 parts per million ("ppm") of PCBs; 3000 pounds of PCB capacitors; and 25 55-gallon drums of debris. HELPER also holds a solid waste management permit issued by the State of South Dakota Department of Environment and Natural Resources ("DENR") under that State's delegated authority pursuant to the Resource Conservation and Recovery Act ("RCRA"). (Exs. 6, 9; Tr. 115-116). [\(1\)](#)

3. In order to obtain EPA approval to store PCBs, and its State DENR permit, HELPER prepared a detailed Contingency-Spill Prevention Control and Countermeasure Plan ("SPCC Plan"). The plan was initially prepared in 1989 or 1990. It was revised several times, including in February 1993. The February 1993 revision of the SPCC Plan includes a material safety data sheet ("MSDS") for PCBs, prepared by the chemical reference publisher, Genium Publishing Company. The MSDS describes the chemical and physical properties of PCBs. It also provides detailed information on the proper procedures for storing and disposing of the material, and for responding to spills, leaks, fires and other emergency releases of PCBs. The MSDS also includes sections on the health hazards of PCBs, and precautions for workers' protection from this substance. The MSDS indicates that PCBs are considered a carcinogen by the EPA. (Ex. 9, pp. O-P).

4. HELPER first sent copies of the SPCC to the DENR and the Lake County Emergency Management Agency, at least by 1990. The February 1993 revision that included the MSDS for PCBs was in the hands of those agencies and the Madison Fire Department by February 1993. (Tr. 186-187, 194-195).

5. HELPER submitted a Tier II Emergency and Hazardous Chemical Inventory form to the South Dakota SERC on October 20, 1994. The form was signed by HELPER's environmental manager, Mike Yocum. The inventory form listed PCBs as a hazardous chemical stored by Respondent. The maximum daily amount listed was 100,000 pounds; average daily amount 60,000 pounds; and maximum container capacity 125,000 pounds. The form also listed two other hazardous chemicals present at the HELPER facility - copper and 1,1,1, trichloroethylene. The form also included a description and

diagrams of the PCB containers and storage area within the facility. (Ex. 6).

6. The PCB-contaminated liquid in the transformers consists of mineral oil dielectric fluid ("MODEF") also known as "mineral oil" or "transformer oil," with a PCB content of from 50 to 499 ppm. The maximum PCB concentration of 499 ppm, in terms of percentage, is 0.05%, or five one-hundredths of one percent. The PCB capacitors contain smaller amounts of highly concentrated PCB liquids, up to 80% PCBs. An average capacitor weighs 75 pounds and is comprised of from 5 to 10% of liquid. (Ex. 9, p G-9).

7. After receiving the used transformers, HELPER tests the MODEF to ensure that the PCB content is between 50 and 499 ppm. The PCB-contaminated liquids are then pumped into two 4000-gallon tanks for storage, from where it is ultimately pumped into trucks for disposal off-site. The MODEF is always in liquid form during normal operations. The mineral oil containing PCBs at HELPER is not present in the form of mist, or airborne droplets, although it is possible that an oil mist could result from an accident, such as the rupture of a hose under pressure. (Ex. 9; Tr. 251-254).

8. On October 15, 1992, at the time of an EPA inspection of the facility HELPER had approximately 57,000 pounds of PCB-contaminated MODEF liquid in storage, approximately equal to its maximum capacity of 8000 gallons. If those PCB-contaminated liquids were at the maximum concentration of 499 ppm PCBs, the amount of pure PCBs present would have been approximately 30 pounds. (Ex. 15). The remainder of the material was the transformer oil, a type of mineral oil.

9. Mineral oils are distilled from naturally occurring crude petroleum oils. The American Conference of Government and Industrial Hygienists ("ACGIH") lists "Oil Mist, Mineral" as a potentially hazardous substance used in the workplace, in its publication of Threshold Limit Values ("TLVs"). That publication assigns mineral oil mist a TLV of 5 milligrams per cubic meter of air, expressed as a time-weighted average over an eight-hour work day and a 40-hour work week. Mineral oil mists are generated in certain industrial applications, such as metal working, lubrication, textile machinery, rock drilling, printing inks, rubber extenders, and pharmaceutical preparations. The TLV represents an industrial hygiene guideline, establishing a concentration to which nearly all workers may be repeatedly exposed without adverse effect. (Exs. 3; 16, pp. iii, 1145; Tr. 236).

10. The HELPER facility was visited frequently by representatives of the City of Madison Fire Department, the Lake County Emergency Response Commission, and the South Dakota Department of Environment and Natural Resources during the period from 1988 to 1993. The Fire Department Chief, Dan Millard, inspected the HELPER facility on April 29, 1993. Mr. Yocum, HELPER's compliance manager, or Dan Parady, its President, often gave tours of the facility to these officials and to groups such as the Madison Rotary Club. (Ex. 10; Tr. 123-127).

11. Dan Parady, the President of HELPER, was initially a member of the Lake County Emergency Management Agency, when it was first established in 1985. In the years since, he has donated the services and equipment of HELPER to the County Emergency Agency on several occasions by helping in the clean up of small oil spills in the Madison area. (Tr. 198-200).

Discussion

Count I of the Complaint charges that the Respondent did not submit an MSDS for PCBs in a timely manner to the appropriate State and local authorities, as required by EPCRA §311, 42 U.S.C. §11021, and the regulations at 40 CFR Part 370. Count II alleges that HELPER did not submit the hazardous chemical inventory form in a timely manner to the same authorities, as required by EPCRA §312, 42 U.S.C. §11022.

HELPER argues that it is exempt from the requirements of both statutes, since the hazardous chemicals present at its facility did not meet the minimum threshold levels for reporting. Alternatively, if it is not exempt, HELPER contends that it substantially complied by fully informing the State DENR, Lake County Emergency Management Agency, and City of Madison Fire Department, of the presence of PCB-

contaminated liquids at its facility by submitting to those agencies copies of its SPCC which included an MSDS for PCBs.

This decision finds that HELPER was exempt from these reporting requirements because the quantity of hazardous chemicals in its facility did not meet the minimum thresholds for reporting or for being considered a hazardous chemical. Hence it is not necessary to address in detail the issue of substantial compliance, and both charges are dismissed.

On the date of the Region's inspection, October 15, 1992, HELPER was storing near its permitted maximum amount of PCB-contaminated liquids -- approximately 8000 gallons or 57,000 pounds. It is not disputed that, if the PCBs in this liquid mixture were at the maximum permitted level of 499 ppm, they would weigh approximately 30 pounds. (Finding of Fact, or "FF," #8). It is also not disputed that this maximum amount would comprise 0.05% of the mixture. The remaining 99.95% of the mixture is mineral oil. Under the EPCRA regulations for calculating the quantity of hazardous chemical in a mixture, this amount of PCBs not only doesn't meet the reporting threshold, but is not even sufficient to be considered a hazardous chemical under the OSHA definition.

Facility owners or operators are required to submit an MSDS and inventory form for hazardous chemicals present at the facility at any one time in amounts equal to or greater than 10,000 pounds, (or 500 pounds for extremely hazardous substances listed in 40 CFR Part 355). 40 CFR §370.20(b)(1,2). A facility owner or operator has the option of reporting on each component of the mixture that is a hazardous chemical, pursuant to EPCRA §311(a)(3) and 40 CFR §370.28. The calculation of the quantity, under §370.28(b)(1), only requires reporting of chemicals that exceed 1% by weight of the mixture, or 0.1% if carcinogenic. This provision tracks the parallel OSHA regulation, at 29 CFR §1910.1200(d)(5)(ii), which states as follows:

"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 which comprise one percent (by weight or volume) or greater of the mixture, except that the mixture will be assumed to present a carcinogenic hazard if it contains a component in concentrations of 0.1 percent or greater which is considered to be a carcinogen . . ."

Assuming that PCBs are carcinogenic, they still comprised less than 0.1% of the mixture in HELPER's stored transformers. They were also far below the 10,000-pound EPCRA reporting threshold.⁽²⁾ Thus, the mixture as a whole would not be considered to present a carcinogenic or health hazard unless the mineral oil is considered a hazardous chemical.

Before addressing that question, it must be noted that the Complaint specifically charged the Respondent only with not reporting on PCBs in a timely manner. (Complaint, ¶¶6-8, 11-12). The Complaint does not mention mineral oil, transformer oil, or any other chemical besides PCBs. Under a narrow reading of the charges, the inquiry could end here. However, the Region also contends that the mixture as a whole should have been reported because HELPER did not undertake a hazard determination for the PCB-contaminated transformer liquids. Under this theory, HELPER would have been required to report on the mixture as a whole, as a PCB-contaminated mineral oil. HELPER did in fact submit an inventory form in October 1994 that reported on the mixture as a whole, as simply "PCBs."

The Region's argument would, in effect, hold Respondent responsible for charges not made in the Complaint. For the time period under consideration, 1992 and 1993, Respondent still had the option to report on the components of its mixture, if they reached the reportable thresholds. Under the mixture method, the components in the PCB-contaminated MODEF do not meet the EPCRA reporting threshold, and neither the components nor the mixture are defined as hazardous under OSHA. Under the mixture and threshold rules, the submittal of the 1994 inventory form was only an optional, precautionary reporting. Regardless of how HELPER chose to report in 1994, it was not required to submit an MSDS and inventory form under EPCRA for the 1992-1993 period alleged in the Complaint.

As an employer under the OSHA, HELPER was not required to conduct its own hazard evaluation of its chemicals, but could rely on information supplied by the chemical manufacturers, under 29 CFR §1910.1200(d)(1). Although Mr. Yocum testified that he was unaware of the requirement to conduct a discreet OSHA hazard determination, HELPER did submit into evidence a representative MSDS for transformer oil (Ex. 12). HELPER routinely included an MSDS for PCBs in its SPCC, but not for the transformer oil. It is evident that HELPER quite properly had sufficiently determined for all practical purposes, although perhaps not formally, that the transformer oil was not a hazardous chemical.

In any event, the Complaint did not charge HELPER with failing to properly conduct a hazard determination under the OSHA. Rather, the Complaint charged HELPER with not submitting an MSDS and inventory form for PCBs or PCB-contaminated liquids as required by EPCRA. The burden of proof was on the Region to show that Respondent was required to report on its hazardous chemicals. The Region failed to show that HELPER had reportable quantities of hazardous chemicals on hand. Although it may have been desirable for HELPER to make available an MSDS for mineral oil, as it did for PCBs, as part of its SPCC plan, it was not required to do so by EPCRA or OSHA. The evidence confirms the conclusion that transformer oil, or mineral oil, is not a hazardous chemical, and need not be reported in any quantity, or as part of a mixture.

The OSHA definition of hazardous chemicals, found in 29 CFR §1910.1200(c), is incorporated by EPCRA §§311(e) and 312(c), as the applicable definition for hazardous chemicals requiring the submittal of an MSDS and inventory form. That regulation defines hazardous chemical as "any chemical which is a physical hazard or health hazard." Whether a chemical is a physical or health hazard is determined by conducting a hazard determination under §1900.1200(d). As discussed above, this can be done by relying on information supplied by the chemical manufacturers, under subsection (d)(1).

Pursuant to 29 CFR §1910.1200(d)(3), certain sources are cited as authorities establishing that chemicals listed in them are deemed hazardous. One of these is a publication by the American Conference of Government and Industrial Hygienists ("ACGIH") entitled *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment* ("TLV list"). This document is a comprehensive list of hundreds of chemicals used in the workplace, with the ACGIH's recommendations for safe levels of workers' exposure to these substances. An excerpt of the TLV list that included the page for "Oil Mist, Mineral" was received into evidence. (Ex. 3). The relevant portion of the supporting Documentation for the oil mist listing, and introductory material on the meaning and use of TLVs was received as well. (Ex. 16).⁽³⁾

The Region argued that the ACGIH listing of a TLV for Oil Mist, Mineral indicated that the transformer oil or mineral oil stored by HELPER was itself a hazardous chemical subject to EPCRA reporting under §§311 and 312. If this is so, HELPER would have been required to report on it or the mixture as a whole. However, a review of the TLV and the documentation reveals that the hazard stems only from mineral oil in its airborne, or mist, form, as the title of the listing indicates on its face. This corroborates the testimony of Stephen Busch, P.E., Respondent's expert witness on this issue, and statements on the transformer oil MSDS itself, published by Texaco. (Ex. 12).

The ACGIH publication considers only mineral oil mist, not liquids stored in tanks or containers. The TLV for mineral oil mist is 5 milligrams per cubic meter of air, averaged over an 8-hour work day and 40-hour work week. (FF #9). The typical applications cited by the ACGIH that generate oil mist include metal working, textile machinery, drilling, and mist lubrication. Electrical equipment is not mentioned. This standard has no relation to the conditions of mineral oil storage at the HELPER facility, where no mist is generated. (FF #7). 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.

The Region points out in its reply brief that HELPER was also permitted to store PCB capacitors and other PCB-contaminated debris and equipment. The Region has not, however, shown that Respondent stored more than the threshold reporting amount of 10,000 pounds at one time of such PCBs from all sources. Respondent is permitted to store 3000 pounds of PCB-contaminated capacitors, plus 25 55-gallon drums of debris. The capacitors could contain up to 10% by weight of concentrated PCB-contaminated liquids, while the debris typically contains little liquid. The capacitors are not opened, but are stored in drums or on pallets. (Ex. 9, p. G-9). The PCBs would still be far below the threshold reporting amount, and the capacitors are probably exempt as "articles" under 29 CFR §1910.1200(b)(1)(v). (See Ex. 2). In any event, the Complainant focused only on the PCB-contaminated liquids from electrical transformers and did not prove that the capacitors or other PCB material met the reporting threshold.

In summary, the PCB-contaminated liquids stored by HELPER are not defined as hazardous under EPCRA, which incorporates the OSHA definition in 29 CFR §1910.1200(c). Since PCBs comprise less than 0.1% of the mixture and the remaining component, mineral oil, is not a hazardous chemical, the mixture as a whole is not hazardous under that definition. Other possible sources of PCBs stored by HELPER, such as capacitors, were stored in amounts far below the reporting threshold of 10,000 pounds. Hence, HELPER was not required to submit an MSDS and inventory form for its PCB-contaminated liquids or other PCB materials in storage. Both charges in the Complaint must therefore be dismissed.

- Subsidiary Issues

The Region was understandably misled to some degree by the Respondent's filing of a Tier II inventory form in 1994 that apparently reported on the PCB-contaminated liquids as a whole. Since the amount exceeded 10,000 pounds, it appeared that Respondent had failed to submit the form and/or the MSDS to the three required State and local agencies in the prior years. Respondent is not estopped, however, from now claiming it was exempt, as the Region argues.

It does appear that Mr. Yocum, HELPER's compliance manager, was not specifically aware of EPCRA reporting requirements, and their possible relevance to his company, until a conversation with Ralph Houck of EPA in July 1993. (Ex. 7). Only afterwards, when HELPER answered the Complaint in this proceeding and analyzed the PCB liquids present in its facility, did Mr. Yocum realize that its chemicals did not meet the reporting threshold. Under the OSHA definition, HELPER simply did not have reportable levels of hazard chemicals on hand at any relevant time. The fact that HELPER may have been ignorant of a law that did not apply to it, and then attempted to comply although it was not required to, does not change this reality.

This decision concludes that HELPER was not required to submit an MSDS or inventory form under EPCRA §§311 and 312, since its hazardous chemicals did not meet the reporting threshold. Therefore, it is unnecessary to determine whether the Respondent complied or substantially complied with these requirements anyway. It will suffice to note that the record does not show definitively exactly when the MSDS for PCBs was submitted to the State and local authorities. (FF #4). Those authorities did, however, have copies of HELPER's SPCC plan during the relevant period and were fully aware of Respondent's storage of PCB-contaminated liquids. The evidence shows Respondent submitted a Tier II inventory form to the State DENR only in October 1994. These submittals of the MSDS and inventory form are construed as optional and precautionary, in light of the fact that HELPER was not required to file them under EPCRA.

The Respondent also raised the defense of statute of limitations in its pleadings and briefs. Again, it is not necessary to address this issue in light of the decision that Respondent was exempt from EPCRA reporting. Nevertheless, the decision was based on the facts showing that HELPER did not have threshold quantities of hazardous chemicals that required reporting. If Respondent had been subject to reporting under EPCRA §§311 and 312, any violation would have continued until at least October 1992, the date alleged in the Complaint that Respondent had

a reportable amount of PCB-contaminated liquids present in its facility.

Conclusion of Law

The Respondent, HELPER, did not have present in its facility quantities of hazardous chemicals that met the threshold for requiring submittal of an MSDS or inventory form pursuant to EPCRA §§311 and 312, respectively.

Order

The charges alleged in the Complaint are dismissed.

Andrew S. Pearlstein
Administrative Law Judge

Dated: February 20, 1998
Washington, D.C.

1. Citations to the stenographic transcript ("Tr.") and exhibits ("Ex.") are representative only, and not intended to be exhaustive.
2. Although PCBs are considered carcinogenic, they are not listed as an extremely hazardous chemical in 40 CFR Part 355, which would subject them to a 500-pound reporting threshold or lower threshold planning quantity.
3. The documentation for the oil mist listing was the subject of official notice by the Administrative Law Judge after the hearing, received over Respondent's objection. The listing had been marked for identification during the hearing as part of Exhibit 8, but inadvertently not received into evidence.

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