



wastes in the tanks and in the roll-off were hazardous. Hallar alleged that the samples were not taken in accordance with accepted procedures and applicable rules and regulations, and thus, were not representative [of the materials sampled]. Hallar's prehearing exchange, filed August 19, 1998, reveals that it is relying on EPA SW-846 "Test Methods For Evaluating Solid Waste-Physical/Chemical Methods", September 1986 Revision, to support its contention that the samples were not taken in accordance with accepted procedures, and accordingly, are not representative.

Wastes that are hazardous by virtue of the toxicity characteristic are set forth in Table 1 at 40 C.F.R. § 261.24(b). The first sentence of § 261.24(a) requires that a representative sample of the material be tested, providing as follows: "(a) A solid waste exhibits the characteristic of toxicity if, using the Toxicity Characteristic Leaching Procedure, Test Method 1311 in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, as incorporated by reference in § 260.11 of this chapter, the extract from a representative sample of the waste contains any of the contaminants listed in table 1 at the concentration equal to or greater than the respective value given in that table." Among other things, SW-846 provides for the development of a scientifically credible plan for sampling solid waste and points out that data generated by a scientifically defective sampling plan have limited utility, particularly in regulatory proceedings (Id. at Nine-1). According to Hallar, the samples upon which Complainant relies were taken from a single point in each of Tanks 2 & 3 and from one point in the roll-off.

Complainant sought and was granted permission to file a prehearing brief on sampling issues, seeking a ruling that EPA is not bound by regulation or guidance to perform sampling in any prescribed manner.<sup>(2)</sup> Complainant makes no attempt to demonstrate that the samples were collected in accordance with methods prescribed in SW-846, but argues that SW-846 is merely a guidance document and that the procedures specified therein are not required. (Brief at 3, 4). Complainant buttresses this contention by citing 40 C.F.R. Part 261, subpart C-"Characteristics of Hazardous Waste" and in particular § 261.20(c) providing as follows:

(c) For purposes of this subpart, the Administrator will consider a sample obtained using any of the sampling methods specified in appendix I to be a representative sample within the meaning of part 260 of this chapter.

[Comment: Since the appendix I sampling methods are not being formally adopted by the Administrator, a person who desires to employ an alternate sampling method is not required to demonstrate the equivalency of his method under the procedures set forth in §§ 260.20 and 260.21.]

The opening paragraph of Appendix I to Part 261-Representative Sampling Methods-provides:

The methods and equipment used for sampling waste materials will vary with the form and consistency of the waste material to be sampled. Samples collected using sampling protocols listed below, for sampling waste with properties similar to the indicated materials, will be considered by the Agency to be representative of the waste.

Sampling methods listed include for containerized liquid wastes "COLIWASA"-containerized liquid waste sampler. As described in "Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods" [SW-846] "COLIWASA" is a device employed to sample free-flowing liquids and slurries contained in drums, shallow open-top tanks, pits, and similar containers. It is said to be especially useful for sampling wastes that consist of several immiscible liquid phases. The sampling instrument is described as consisting of a glass, plastic, or metal tube equipped with an end closure which can be opened and closed while the tube is submerged in the material to be sampled. The concept is that the sample taken will be a composite of all the liquid wastes through which the sampler is drawn.

Complainant says that the reference to "COLIWASA" in Appendix I to Part 261 is

merely a recommendation and asserts that there are no prescribed procedures for sampling sludge-like material from the roll-off. (Brief at 3, 4). As support for the former assertion, Complainant says that the Agency has stated on numerous occasions that SW-846 is not the exclusive method by which a waste must be sampled or tested, citing 55 Fed. Reg. 4440-41 (September 8, 1990) ("This notice, or the subsequent final rule, should not be construed to require the use of SW-846, Third Edition methods except where specifically described by regulation."); 58 Fed. Reg. 46040-41 (August 31, 1993); 62 Fed. Reg. 32452-53 (June 12, 1997) ("Use of some of these methods is required by some of the hazardous waste regulations under subtitle C of RCRA, In other situations, SW-846 functions as a guidance document setting forth acceptable, although not required, methods to be implemented by the user, as appropriate, in satisfying RCRA-related sampling and analysis procedures.") Additionally, Complainant maintains that the Agency has made it clear that sampling procedures used by EPA may legitimately vary from those used by the regulated community (Brief at 4). Complainant's quote from 55 Fed. Reg. 4442 is in part as follows:

Sampling strategies for these situations (proving the positive [i.e., that a particular waste is subject to regulation]) often do not require a precise determination of the actual magnitude of the property. If a sample possesses the property of interest, or contains the constituent at a high enough level relative to the regulatory threshold, then the population from which the sample was drawn must also possess the property of interest or contain that constituent. Depending on the degree to which the property of interest is exceeded, testing of samples which represent all aspects of the waste or other material may not be necessary to prove that the waste is subject to regulation.

Complainant says that courts have also held that SW-846 sampling methods are not mandatory as SW-846 is only a guidance document (Brief at 5). Complainant cites F & K Plating, RCRA Appeal No.86-1A, 2 E.A.D. 443 (CJO, October 8, 1987), wherein the CJO upheld the ALJ's finding that tests on samples were conducted in accordance with EP toxicity procedures (2 E.A.D. at 445). With respect to methods of sampling, the CJO cited Appendix II to Part 261, (1983) ¶ 1 of which specifically allows the use of "any method capable of yielding a representative sample within the meaning of Part 260." (Id.) No comparable provision appears in the regulation in effect at the time of the sampling and testing at issue here. Complainant points out that "representative sample" is defined in 40 C.F.R. § 260.10 as meaning "a sample of a universe or whole (e.g., waste pile, lagoon, ground water) which can be expected to exhibit the average properties of the universe or whole." Complainant acknowledges that whether the samples taken by EPA at the Hallar facility are representative of the material in the tanks and the roll-off is a factual matter. (Brief at 5). Complainant says it will present expert testimony at the hearing that the samples accurately represented materials at the facility.

#### Hallar's Opposition

Opposing the motion, Hallar points out that Respondent's [Complainant's] Exhibit 11 is a copy of the protocol and procedures, actually "Used Oil Initiatives Inspection Sampling Activities Quality Assurance Project Plan", in which EPA's contractor, PRC Environmental Management, Inc., describes the sampling procedures and testing method it will use for quality control (Reply, filed December 28, 1998). The Plan identifies COLIWASA as among equipment that may be required for sampling containerized liquid, sludge and slurry and provides that the sampling team must assure that the samples represent the entire contents of the container, not just the contents of a single layer (SOP NO. 2, Revision 2, May 18, 1993, ¶¶ 1.5 and 2.0). Hallar disputes the notion that it was raining at the time of the inspection and denies that Complainant's representative was instructed not to climb the tanks to take samples for safety reasons.<sup>(3)</sup> As Hallar points out, even if these allegations were true, methods used in collecting the samples would not thereby be scientifically acceptable. Hallar asserts that there is no reasonable explanation for the P.R.C. representative failing to follow recommended and approved procedures. Hallar argues that the methods used are not scientifically valid, and that, accordingly, the [test results] should not be considered.

Discussion

The definition of the characteristic of "toxicity" set forth in § 261.24(a) leaves no doubt that in determining whether a sample contains contaminants at a concentration equal to or in excess of the levels specified in Table 1 so as to be a hazardous waste because of toxicity, the Toxicity Characteristic Leaching Procedure, Test Method 1311 of SW-846, must be followed.<sup>(4)</sup> Accordingly, it seems anomalous, if methods of collecting samples in SW-846 are merely recommendations as contended by Complainant, while the test method is mandatory. In this regard, Complainant's reliance on the comment at § 261.20(c) to the effect that a person desiring to employ an alternative sampling method is not required to demonstrate equivalency under the procedures set forth in §§ 260.20 and 260.21 is misplaced, because "person" as used therein is not referring to EPA. This is evident from the comment at 261.20(a) which emphasizes the generator's responsibility to determine whether his waste exhibits one or more of the characteristics of hazardous waste identified in Subpart C and from § 261.20(c) which provides that the Administrator will consider a sample obtained by any of the methods specified in appendix 1 of this chapter to be a representative sample within the meaning of part 260 of this chapter.

Complainant has correctly quoted Federal Register notices (ante at 5, 6) which generally support its position. Also relevant, but not necessarily controlling in the particular instance at issue are changes effected by SW-846 (Third Edition). The preface to SW-846 (Second Edition, 1982) states that SW-846 [sampling and testing] methods would be used in RCRA investigations.<sup>(5)</sup> However, this provision has been deleted in the Third Edition of SW-846, issued in November of 1986, the "Preface and Overview" providing, inter alia, that [SW-846] brings together in one reference all sampling and testing methodology approved by the Office of Solid Waste for use in implementing the RCRA regulatory program.<sup>(6)</sup> While this undoubtedly reflects the Agency's preference for SW-846 sampling and testing methods and indicates that only those methods have been approved by OSW in implementing the RCRA program, it stops short of a representation that only these methods are acceptable or will be used by the Agency in RCRA inspections and investigations.

Irrespective of whether SW-846 is mandatory or merely advisory, the necessity for a scientifically acceptable method of sampling is not thereby affected. For example, if the waste in the tanks had become stratified, it is questionable whether a sample drawn from a single point would be a representative of the contents of the tank. While Hallar asserts that the sampling methods used were not scientifically valid and that the samples should not be considered [as evidence that the wastes were hazardous], Complainant says it will present expert testimony at the hearing that the samples accurately represent materials at the facility.

In view of the foregoing, and the fact that EPA has deleted the statement from SW-846 to the effect that SW-846 methods would be used in RCRA investigations, and that the Agency's policy is to adopt performance based rather than mandatory test methods, it is concluded that the issues of whether, for example, "COLIWASA" was mandatory and whether the samples taken were representative of wastes at the facility should be decided after the evidence is heard.

ORDER

Complainant's motion is granted to the extent that whether sampling methods in SW-846 are mandatory and whether samples taken were representative of wastes at the facility will be decided after the evidence is heard.

Dated this 20<sup>th</sup> day of January 1999.

Original signed by undersigned

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Spencer T. Nissen  
Administrative Law Judge

1. Although § 261.24 is not referred to in the complaint, the complaint does allege that the wastes are hazardous wastes as defined in § 261.3 which defines as hazardous, wastes having the characteristics of hazardous waste identified in subpart C of Part 261. Section 261.24 is included in subpart C.
2. Complainant's unopposed motion that the brief, which was filed on December 1, 1998, rather than not later than November 27, 1998, as ordered, be accepted is granted.
3. Complainant's proposed Exhibit 13 includes a report of an earlier inspection of Hallar's facility, dated December 1, 1992, which indicates that a light rain was falling at the time of the inspection and Complainant may have confused the inspections.
4. The Agency is currently developing a performance based measuring system (PBMS) for the RCRA program which has as its objective the elimination of mandatory test methods and which would make SW-846 truly a "guidance document". See Lesnik and Fordham, USEPA "An Update of the Current Status of the RCRA Methods Development Program" (June 1998). This article can be printed and downloaded from EPA's Office of Solid Waste Web site at [www.epa.gov/epaoswer/hazwaste/test/rcra.pdf](http://www.epa.gov/epaoswer/hazwaste/test/rcra.pdf). The question here, of course, is whether sampling methods, e.g., "COLIWASA", in effect at the time of the inspection in November of 1996 were required or merely advisory.
5. The preface to SW-846 "Test Methods for Evaluating Solid Waste Physical/Chemical Methods (Second Edition, July 1982) provides in part: This manual has been developed to: a. provide methods which will be acceptable to the Agency when used by the regulated community to support waste evaluations and listing and delisting petitions, and b. describe the methods that will be used by the Agency in conducting investigations under [RCRA] Section[s] 3001, 3007, and 3008.
6. The "Preface and Overview" of the Third Edition of SW-846 provides in part: Purpose Of The Manual-Test Methods for Evaluating Solid Waste (SW-846) is intended to provide a unified, up-to-date source of information on sampling and analysis related to compliance with RCRA regulations. It brings together into one reference all sampling and testing methodology approved by the Office of Solid Waste for use in implementing the RCRA regulatory program. The manual provides methodology for collecting and testing representative samples of waste and other materials to be monitored. Aspects of sampling and testing covered in SW-846 include quality control, sampling plan development and implementation, analysis of inorganic and organic constituents, the estimation of intrinsic physical properties, and the appraisal of waste characteristics.

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