



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 22 1998

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Ms. Nancy T. Holtby
Nixon, Hargrave, Devans & Doyle, LLP
Clinton Square
P.O. Box 1051
Rochester, NY 14603-1051

Dear Ms. Holtby:

This letter responds to your January 6, 1998 letter to Marged Harris of our office regarding Emergency Planning and Community Right-To-Know Act (EPCRA) reporting requirements under Sections 311 and 312. In your letter you describe your client, a company which services large forklift batteries by adding distilled water to the batteries. The conclusion stated in your letter, "that the sulfuric acid and lead in batteries does not need to be included when calculating EPCRA Section 311 and 312 thresholds" is incorrect.

EPCRA Section 311 provides that "the owner or operator of any facility which is required to have available a material safety data sheet for a hazardous chemical under the Occupational Health and Safety Act of 1970 [OSHA] . . . shall submit a material safety data sheet for each such chemical" The term hazardous chemical has the meaning given such term by OSHA regulations at 29 C.F.R. § 1910.1200(c), with the exception of those substances specifically exempted in EPCRA Section 311(e). OSHA regulations, at 29 C.F.R. § 1910.1200(b)(6)(v) provide an exemption from the Hazard Communication requirements for an "article," which is defined at 29 C.F.R. § 1910.1200(c) as:

a manufactured item . . . (i) which is formed to a specific shape or design during manufacture; (ii) which has end use functions(s) dependent in whole or in part upon its shape or design during end use; and (iii) which under normal conditions of use does not release more than very small quantities . . . of a hazardous chemical . . . , and does not pose a physical hazard or health risk to employees.

A directive published by OSHA sets forth the definition of an article and clearly identifies lead acid batteries as examples of products which would NOT be considered "articles" and would thus not be exempted from the requirements. The directive states that the following is an

example of a product which is not an article under the standard and thus is not exempted from the requirements:

Lead acid batteries which have the potential to leak, spill or break during normal conditions of use, including foreseeable emergencies. In addition, lead acid batteries have the potential to emit hydrogen which may result in a fire or explosion upon ignition.

OSHA Instruction CPL 2-2.38D, March 20, 1998 (supercedes CPL 2-2.38C, October 22, 1990), Office of Health Compliance Assistance.

OSHA further clarified this issue in correspondence between OSHA and the Texas Department of Health, dated March 3, 1997 and June 20, 1997. See attached.

Therefore, all forms of lead-acid batteries are not considered articles because they have the potential to leak, spill, or break during normal conditions of use, including foreseeable emergencies. Consequently, an MSDS is required under OSHA. If none of EPCRA's exemptions to the definition of hazardous chemical apply (*see* EPCRA § 311(e)), and if the total amount of sulfuric acid present exceeds the sulfuric acid threshold level as defined under EPCRA, or the total amount of lead present exceeds the lead threshold level as defined under EPCRA, then the facility must report under EPCRA Sections 311 and 312.

If you have any questions regarding the above, please call Meg Victor at (202) 260-1379 or Beth Burchard at (202) 564-4177.

Sincerely,



Jesse Baskerville, Director
Toxics and Pesticides Enforcement Division
Office of Regulatory Enforcement



David Speights, Associate Director
Program Development Division
Chemical Emergency Preparedness and
Prevention Office

Attachments

cc: Earl Salo, USEPA Office of General Counsel