

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG-21
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REGIONAL HEARING
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In the Matter of :
The Okonite Company, Inc., : Docket No. TSCA-02-2010-9104
Respondent. : Hon. Barbara A. Gunning
 : Presiding Officer
 :
Proceeding under Section 16(a) of :
the Toxic Substances Control Act. :
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COMPLAINANT'S PREHEARING EXCHANGE

Complainant, the Director of the Division of Enforcement and Compliance Assistance (DECA) of the United States Environmental Protection Agency (EPA or Agency), Region 2, by and through Region 2's Office of Regional Counsel, herewith submits this Prehearing Exchange in accordance with 40 C.F.R. Section 22.19(a) and the order of this Court, dated May 4, 2010.

I. PRELIMINARY STATEMENT

On September 23, 2009, Complainant sent Respondent a Notice of Opportunity with Respect to Action under the Toxic Substances Control Act (TSCA). Complainant and Respondent held a settlement conference on October 14, 2009, but were unable to reach a settlement agreement. Complainant commenced an action under the authority of Section 16(a) of TSCA, 15 U.S.C. § 2615(a). The Complaint and Notice of Opportunity for Hearing (Complaint), served on December 2, 2009, alleges Respondent's unauthorized use of two (2) polychlorinated biphenyl (PCB) transformers or "PCB Transformers" as that term is defined in Section 761.3 of Title 40 of the Code of Federal Regulations (C.F.R.). The Complaint alleges in two (2) counts that Respondent was using two PCB Transformers without complying with all

requirements of 40 C.F.R. § 761.30 (a)(1)(vi)(A). Specifically, Respondent failed to register said transformers with the EPA by December 28, 1998, in violation of the regulations found at 40 C.F.R. Sections 761.20 and 761.30. The Complaint seeks a total penalty of \$33,500. On February 22, 2010, Respondent filed its Answer to the Complaint. On April 28, 2010, an Alternative Dispute Resolution conference was held. To date, the parties have not reached a negotiated settlement.

II. COMPLAINANT'S WITNESSES

Complainant submits the following names of witnesses whom EPA may call:

Ann Finnegan, Life Scientist, EPA's Toxics Section of the Pesticides and Toxic Substances Branch (PTSB), Division of Enforcement and Compliance Assistance (DECA). Ms. Finnegan works out of the Agency's Edison facility (2890 Woodbridge Avenue, Edison, New Jersey). Ms. Finnegan is expected to testify as to her inspection and concomitant observations during her inspection of Respondent's facility on May 7, 2009. Her testimony should include what she was told and otherwise learned during the inspection, including information with regard to Respondent's operations and PCB Transformers. She is also expected to testify as to information Respondent provided during the inspection and her evaluation of such information. Ms. Finnegan should also discuss and describe Complainant's exhibits, and the preparation and development of the Complaint.

Vivian Chin, Environmental Engineer, EPA's Toxics Section of PTSB, DECA; she works out of the Agency's Edison facility. Ms. Chin was one of the EPA inspectors during the May 7, 2009 inspection of Respondent's facility. Her expected testimony may cover many of the areas outlined for that of Ms. Finnegan (including what she observed, learned and concluded

concerning Respondent, its operations and PCB Transformers). Ms. Chin should also discuss and describe Complainant's exhibits.

Daniel Kraft, Chief of the Toxics Section of PTSB, DECA; he works out of the Agency's Edison facility. Mr. Kraft is expected to testify as to his review of the documents from EPA's inspection of Respondent's facility, the development and preparation of the Complaint and the proposed penalty. His expected testimony with regard to the penalty amounts sought should cover their consistency with and adherence to the applicable TSCA statutory provisions, and the appropriateness of the proposed civil penalty relative to the facts and circumstances underlying this proceeding.

Complainant reserves the right, and nothing herein is intended or is to be construed to prejudice or waive any such right, to call or not to call any of the aforementioned potential witnesses, and to expand or otherwise modify the scope, extent and/or areas of the testimony of any of the above-named potential witnesses, where appropriate. In addition, Complainant reserves the right, upon adequate notice to the Court and Respondent, to list and to call additional potential hearing witnesses to answer and/or rebut evidence (testimonial or documentary) listed by Respondent in its prehearing exchange or on matters arising as a consequence of such evidence.

III. COMPLAINANT'S EXHIBITS

Complainant expects to offer into evidence the following documents and records, copies of which are annexed hereto as Complainant's exhibits:

Complainant's Exhibit 1

May 27, 2009 EPA Inspection Report from Ann Finnegan and Vivian Chin to Dan Kraft, with the following attachments: EPA Notices of Inspection and TSCA Confidentiality;

Photographs; EPA Receipt for Samples and Documents (with attached Transformer Registration Form, 2008 Annual PCB Log, Monthly Inspection Forms, Scott Testing Transformer Maintenance and Repairs Report dated July 13, 2004); Declaration of Confidential Business Information, and Photograph Table.

Complainant's Exhibit 2

Google Map of the Okonite facility.

Complainant's Exhibit 3

EPA PCB Inspection Manual, dated August 2004, Chapter 1, Chapter 4 - Sections 4.1 and 4.2, and Appendix E.

Complainant's Exhibit 4

September 23, 2009 EPA Notice of Opportunity with Respect to Action Under the Toxics Substances Control Act from Kenneth S. Stoller, Chief, PTSB, to Mr. Victor Viggiano, CEO, The Okonite Company, Inc.

Complainant's Exhibit 5

April 9, 1990 EPA Polychlorinated Biphenyls (PCB) Penalty Policy (PCB Penalty Policy).

Complainant's Exhibit 6

Relevant June 5, 2006 EPA Penalty Policy Supplement Pursuant to the 2004 Civil Monetary Penalty Inflation Adjustment Rule.

Complainant's Exhibit 7

Dun & Bradstreet Corporate Detail Report for Respondent.

Complainant's Exhibit 8

2005 Okonite Consent Agreement and Final Order, Docket No. TSCA-02-2005-9103.

Complainant's Exhibit 9

Okonite Uniform Hazardous Waste Manifest, dated January 21, 2005.

Complainant's Exhibit 10

PCB Basic Information and Health Effects from EPA's Website.

Complainant reserves the right, and nothing herein is intended or should be construed to prejudice such right, to supplement or add, subject to notice to the Court and Respondent, documentary evidence to Complainant's prehearing exchange submission in order to respond to and/or rebut, or otherwise to address an issue arising as a consequence of, evidence Respondent submits in its prehearing exchange or otherwise to update this prehearing exchange.

IV. JUDICIAL NOTICE

In accordance with 40 C.F.R. Section 22.22(f), Complainant hereby requests that the Presiding Officer take judicial notice of the following:

- (1) The Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*, and Federal Register publications and regulations promulgated thereunder.
- (2) The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-34, 110 Stat. 1321 (1996), and the regulations promulgated thereunder.
- (3) The Civil Monetary Penalty Inflation Adjustment Final Rule, under which any violation of TSCA may be assessed up to \$32,500 penalty per day after the effective date of March 15, 2004. 69 Fed. Reg. 7121 (February 13, 2004).

V. COMPLAINANT'S VIEW ON HEARING LOCATION

Complainant requests that the hearing be held in New York City, the location of the main offices of EPA, Region 2, pursuant to 40 C.F.R. Sections 22.19(d) and 22.21(d). Complainant submits that the ready availability of courtroom space in New York City and the easy transportation access to New York City for all concerned militate for the hearing to be held there. Complainant also would not object to holding the Hearing in another location upon mutual agreement by all parties. Complainant estimates that it will take approximately two (2) days to put on its direct case.

VI. STATEMENT REGARDING THE CALCULATION OF THE PENALTY

Generally

The proposed civil penalty is determined in accordance with Section 16 of TSCA, 15 U.S.C. § 2615, which authorizes the assessment of a civil penalty of up to \$25,000 per day for each violation of TSCA and the regulations promulgated pursuant thereto. This figure is adjusted upward to \$32,500 per day for each violation by the Civil Monetary Penalty Inflation Adjustment Final Rule for violations occurring after March 15, 2004. 69 Fed. Reg. 7121 (February 13, 2004).

For purposes of determining the amount of penalty to be assessed, Section 16 of TSCA requires EPA to take into account the nature, circumstances, extent and gravity of the violations. Section 16 of TSCA also requires EPA to take into account the following with respect to the violator: (1) ability to pay, (2) effect of the penalty on ability to continue to do business, (3) any history of prior such violations, (4) the degree of culpability, and (5) such other matters as justice may require. To develop the proposed penalty in the Complaint, Complainant takes into account the particular facts and circumstances of this case, to the extent known at this time, with specific

reference to EPA's PCB Penalty Policy. The PCB Penalty Policy is a guidance document designed to provide a rational, consistent and equitable calculation methodology for applying the statutory penalty factors enumerated above to particular cases. The purpose of a penalty system is also to ensure that economic incentives for committing violations are eliminated and to ensure that persons will be deterred from committing violations.

PCBs are persistent bio-accumulative toxins that pose a serious risk to human health and the environment. Once released into the environment PCBs do not readily break down and therefore may remain a threat for long periods of time. PCBs may accumulate in plant leaves, food crops, and fish. People may be exposed to PCBs that have bio-accumulated in fish, which may result in a variety of adverse health effects. Complainant's Exhibit 10, Basic Information, page 2. The PCB regulations reduce the chance that PCBs will enter the environment, and limit the harm to human health and the environment when entry does occur. Therefore, the PCB regulations are chemical control regulations, as defined by the TSCA Civil Penalty Policy published on September 10, 1980 in the Federal Register, 45 Fed. Reg. 59770. Complainant's Exhibit 5, page 2. EPA's computation of the penalty amount in PCB cases is determined by a two-step process as guided by the PCB Penalty Policy. These steps are: (1) the determination of the "extent" of potential or actual environmental harm from a given violation based on the amount of PCB involved, and (2) the determination of the "circumstances" of the violation which reflects the probability of causing harm to human health or the environment. The "extent" and "circumstances" factors are incorporated into a chart that lists various gravity-based penalty amounts. Once the gravity-based penalty is generated, the PCB Penalty Policy discusses several factors which, when considered, may lead to a downward or upward adjustment of the proposed

penalty in accordance with the aforementioned statutory factors TSCA requires EPA to consider in setting a penalty.

Gravity-Based Penalty

Count 1 of the Complaint alleges unauthorized PCB Transformer use at the Main Building of the Okonite facility. The PCB Transformer behind the Main Building has 435 gallons of fluid that contains PCBs at a concentration of approximately 597,000 parts per million (ppm) Aroclor 1260. *See* Complainant's Exhibit 1, pages 1 and 2. Count 2 of the Complaint alleges unauthorized PCB Transformer use at the Utility Building at the Okonite facility. The PCB Transformer at the Utility Building has 315 gallons of fluid that contains PCBs at a concentration of approximately 603,000 ppm Aroclor 1260. *See* Complainant's Exhibit 1, pages 1 and 2. The "extent" categories for the violations are assessed based on the amount of PCB material involved. A "Significant" extent category is applicable when the PCB Transformer contains between 220 and 1,100 gallons of PCB liquid and the regulation pertains to unauthorized use violations. Complainant's Exhibit 5, page 4. In this case, the extent category for each count is "Significant."

The "circumstances" categories for the violations are assessed based on the probability of causing harm to human health or the environment. Using PCBs in violation of any condition of authorization is deemed a "High Range/Level 2" violation, which is the circumstance category for each count in this case. Complainant's Exhibit 5, page 10

The PCB Penalty Policy contains a gravity-based penalty (GBP) matrix with "circumstance" ranges and "extent" categories. Following the promulgation of the Civil Monetary Penalty Inflation Adjustment Final Rule dated February 13, 2004, a revised matrix for

PCB penalties was provided in the Relevant Penalty Policy Supplement, dated June 5, 2006. Complainant's Exhibit 6. In the GBP matrix, the "Significant" extent and "High Range/Level 2" circumstance yield a penalty of \$16,764 for each count.

The total gravity-based penalty is calculated by adding together the amount for each of the counts: $\$16,764 + \$16,764 = \$33,528$ rounded to the nearest unit of \$100 = \$33,500. No other upward or downward adjustments are made to the total gravity-based penalty, which represents the proposed penalty in the Complaint.

Ability to Pay / Ability to Continue in Business

The business information report for Respondent does not contain any indicia of financial instability. *See* Complainant's Exhibit 7. To date, Complainant has not received an inability to pay or other financial hardship claim from Respondent, nor has Respondent in any other way raised that issue in discussions of this matter. Therefore, Complainant considers ability to pay and ability to continue in business not to be at issue in this matter.

History of Prior Such Violations

When violators have a "history of prior such violations" of TSCA, especially the TSCA PCB regulations, the PCB Penalty Policy allows the penalty to be adjusted upward by as much as 25 percent to reflect the fact that a similar violation occurred within five years of the present violation. This five-year period begins on the date of the final order. In this case, Okonite had prior PCB Transformer violations at its Paterson, New Jersey facility. The prior enforcement action was concluded with a Final Order signed by the EPA Regional Administrator on July 6, 2005. Complainant's Exhibit 8. Although Respondent did have a history of prior such

violations of the PCB regulations within 5 years of the date of the subject Complaint, EPA in this case chose to exercise its enforcement discretion and did not apply the upward adjustment.

Degree of Culpability

TSCA is a strict liability statute, and there is no requirement that a violator's conduct be willful or knowing to establish a violation of TSCA or its implementing regulations. The culpability factor is considered only as an adjustment to the GBP. EPA uses two criteria to determine the degree of culpability of the violator in terms of each violation; knowledge and control. For an unauthorized use violation where the lack of authorization is the result of failing to register the PCB Transformers, EPA can expect that Respondent had, or should have had knowledge of the requirement to register its PCB Transformers with EPA by the December 28, 1998 deadline because this requirement was published on June 29, 1998 in the Federal Register, 63 Fed. Reg. 35384, as part of the amendments to the PCB regulations. EPA can expect that Respondent knew that the transformers in question were PCB Transformers because the nameplate indicated that they were "ITE" transformers filled with "non flammable liquid," which is a commonly known trade name for PCBs, and especially a trade name used by ITE. *See* Complaint's Exhibit 3, Appendix E. EPA can also expect that Respondent had control in this situation, because Respondent had the ability to file such registration on its own behalf. In this case, Respondent is determined to fit into the neutral "Level II" Culpability category – the violator had (or should have had) knowledge or control. No upward or downward adjustment is applied.

Such Other Matters as Justice May Require

No other factors are applied in calculating this penalty. For other matters as justice may require, EPA assesses factors such as voluntary disclosure and the violator's compliance. The disclosure cannot be one that is required by the PCB regulations, and the PCB Transformer registration is required by the regulations. Unauthorized use is a continuing violation. In re Lazarus, 7 E.A.D. 318, 319 (1997). Respondent has not removed the transformers or converted them to non-PCB Transformers; therefore, Respondent is still in violation of the regulations.

VII. PAPERWORK REDUCTION ACT

Because the PCB Transformer registration requirement is a condition of the authorization for continued use of the PCB Transformers, it is continuing in nature. In re Lazarus, 7 E.A.D. 318, 319 (1997). Complainant is only assessing a one-day penalty for each continuing violation, as opposed to the \$32,500 per day penalty authorized under TSCA. The Complaint cites violations as of the May 7, 2009 EPA inspection.


Complainant believes that the Paperwork Reduction Act (PRA), 44 U. S. C. § 3501 *et seq.*, does apply to the requirement to register PCB Transformers. The Office of Management and Budget (OMB) control number associated with the transformer registration requirements in 40 C.F.R Sections 761.20 and 761.30 is 2070-0112. On the date of EPA's inspection, May 7, 2009, an OMB approval was in effect for the control number 2070-0112 and 40 C.F.R. Part 9 displayed the control number. 73 Fed. Reg. 67,867 (November 17, 2008); 40 C.F.R. § 9.1 (2008).

Section 3512 of the PRA provides that no person shall be subject to a penalty for failing to comply when the collection of information does not display a valid control number. 44 U.S.C.

§ 3512. Complainant believes that the provisions of Section 3512 of the PRA are not applicable to this case. Complainant is only assessing a one-day penalty for the continuing violation, as of the May 7, 2009 EPA inspection. On May 7, 2009, a valid OMB control number was in effect and displayed in 40 C.F.R. Part 9. 73 Fed. Reg. 67,867 (November 17, 2008); 40 C.F.R. § 9.1 (2008).

Dated: July 1, 2010
New York, New York

Respectfully submitted,



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In the Matter of The Okonite Company, Inc.
Docket No. TSCA-02-2010-9104

CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Prehearing Exchange was sent this day in the following manner to the addressees listed below:

Original and Copy by Hand:

Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 2
290 Broadway, 16th floor
New York, NY 10007-1866

Copy by Pouch Mail:

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Administrative Law Judge
U.S. Environmental Protection Agency
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Mail Code 1900L
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Copy by Certified Mail,
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KL Juy/